TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 229.

MICHAEL HANLEY AND WILLIAM F. WELCH, PLAINTIFFS IN ERROR,

vs.

CHARLES DONOGHUE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED MAY 25, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 STATE OF MARYLAND, *set:*

At a court of appeals of the State of Maryland begun and held for the said State at the city of Annapolis, on the first Monday of October, it being the second day of said month, in A. D. one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

Present (at the hearing of the proceedings hereinafter set forth) the following associate judges of the said court of appeals: John M. Robinson, Richard H. Alvey, Levin T. H. Irving, and John Ritchie.

Among other were the following proceedings, to wit:

In the Circuit Court for Baltimore County. March Term, 1882.
(Law side.)

THE STATE OF MARYLAND, *Baltimore County,* } *To wit:*

MICHAEL HANLEY and WILLIAM F. WELCH *vs.* CHARLES DONOGHUE.

April 2, 1881, order and nar. filed. (Docket entry.)
Sept. 6, 1881, Demurrer to declaration filed. (Docket entry.)
Oct. 8, 1881, Demurrer sustained, with leave to plead over.
Same day exceptions noted. (Docket entry.)
Nov. 21, 1881, amended declaration filed, with service of copy admitted by defendant's attorney, to wit:

In the Circuit Court for Baltimore County.

MICHAEL HANLEY and WILLIAM F. WELCH *vs.* CHARLES DONOGHUE.

Michael Hanley and William F. Welch, plaintiffs, suing (as to one-fourth of the judgment hereinafter recited) to the use of John D. Braden and George W. Miller, to whom, by the names of Braden and Miller, the judgment hereinafter recited has, to the extent of five hundred dollars, been assigned, and suing in their own right as to the balance of their claim under said judgment by Frederick J. Brown, their attorney, leave of the court being first obtained to their filing this their amended declaration, sue Charles Donoghue:

1. For that whereas, at the court of common pleas in and for Washington county, in the State of Pennsylvania, begun and held in said county, they, the said plaintiffs, having instituted, by the names of Michael Hanley and W. F. Welch, their action of covenant in said court, upon the 4th day of June, 1877, recovered against the said Charles Donoghue, together with one John Donoghue, the sum of two thousand dollars (five hundred dollars of which has been assigned to said Braden and Miller, as aforesaid) for their damages, which they, the said plaintiffs, had sustained by breach of a certain covenant theretofore made by said defendants, whereof the said John Donoghue and Charles Donoghue are convict, as by the record and process thereof in the said court of common pleas, in the county and State aforesaid remaining, appears, which said judgment still remains in full force, strength, and effect, not in any wise reversed,

annulled, vacated, paid off, or satisfied, and the said plaintiffs
2 have not, nor has either of them, as yet, obtained or sued out any execution of or upon the said judgment in form aforesaid recovered, whereby an action has accrued to the said plaintiffs, to demand and have, of and from the said Charles Donoghue, the said sum of money, being the amount of the damages aforesaid, in form aforesaid recovered, to wit: at the court of common pleas in and for Washington county, in the State of Pennsylvania aforesaid.

2. And for that whereas, at the court of common pleas in and for Washington county, in the State of Pennsylvania, begun and held in said county, they, the said plaintiffs, having instituted, by the names of Michael Hanley and W. F. Welch, a certain other action in said court, against the said Charles Donoghue, together with one John Donoghue, his codefendant in said action, *the declaration in said action (filed in January, 1876), which is duly recorded in the proceedings in said action in said court, setting forth that Michael Hanley and W. F. Welch, the plaintiffs, by their attorneys, Braden and Miller, sue John and Charles Donoghue, the defendants, in an action of covenant, and alleging that the defendants had not performed, but had broken, their covenants contained in a certain agreement, under seal, made and executed between the said plaintiffs on the one part and said defendants on the other part, and had not paid certain money which they, by said agreement, had agreed to pay, and the proceedings in said action (which are duly recorded in said court) further showing that a writ of "summons in covenant" was duly issued out of said court of common pleas, directed to the sheriff of said Washington county, and commanding him to summon Charles Donoghue, and that the said summons was duly "served upon Charles Donoghue," and that return to that effect was made by the sheriff, and further showing that process of foreign attachment was issued against John Donoghue, the other defendant, a non-resident of the State of Pennsylvania, and that the said sheriff made return that he had attached the goods, moneys, and credits of said John Donoghue in the hands of certain garnishees, and that he had summoned the garnishees; and said proceedings further showing that said John Donoghue was never summoned and never appeared to the said action, in person or by attorney*, by consideration and judgment of the said court, upon the 4th day of June, 1877, recovered against the said Charles Donoghue, together with said John Donoghue, the sum of two thousand dollars (five hundred dollars of which has since been assigned to Braden and Miller, as aforesaid) for their damages, which they, the said plaintiffs, had sustained by breach of the covenants contained in said agreement under seal, theretofore made by the said defendants, whereof the said John Donoghue and Charles Donoghue are convict, as by the record and process thereof in the said court of common pleas, in the *county* and State aforesaid remaining, appears, which said judgment still remains in all its original force, strength, and effect, not in any wise reversed, annulled, vacated, paid off, or satisfied, and the said plaintiffs have not, nor has either of them, as yet, obtained or sued out any execution of or upon the said judgment, in form aforesaid recovered, whereby an action hath accrued to the said plaintiffs to demand and have of and from the said Charles Donoghue the said

sum of money, being the amount of the damages aforesaid, in form aforesaid recovered, to wit: at the court of common pleas in and for the county of Washington and State of Pennsylvania aforesaid.

3. And for that whereas, at the court of common pleas in and for Washington county, in the State of Pennsylvania, begun and held in said county, they, the said plaintiffs, having instituted, by the names of Michael Hanley and W. F. Welch, a certain other action in said court against the said Charles Donoghue, together with one
3 John Donoghue, his codefendant in said action: *the declaration in said action (filed in January, 1876), which is duly recorded in the proceeding in said action in said court, setting forth that Michael Hanley and W. F. Welch, the plaintiffs, by their attorneys, Braden and Miller, sue John and Charles Donoghue, the defendants, in an action of covenant, and alleging that the defendants had not performed, but had broken, their covenants contained in a certain agreement under seal, made and executed between the said plaintiffs on the one part and the said defendants on the other part, and had not paid certain money which they, by said agreement, had agreed to pay, and the proceedings in said action (which are duly recorded in said court), further showing that a writ of "summons in covenant" was duly issued out of said court of common pleas, directed to the sheriff of said Washington county, and commanding him to summon Charles Donoghue, and that the said summons was duly "served upon Charles Donoghue," and that return to that effect was made by the sheriff, and further showing that process of foreign attachment was issued against John Donoghue, the other defendant, a non-resident of the State of Pennsylvania; and that the said sheriff made return that he had attached the goods, moneys, and credits of said John Donoghue, in the hands of certain garnishees, and that he had summoned the garnishees, and said proceedings further showing that said John Donoghue was never summoned and never appeared to the said action in person or by attorney,* by consideration and judgment of the said court, upon the 4th day of June, 1877, recovered against the said Charles Donoghue, together with said John Donoghue, the sum of two thousand dollars (five hundred dollars of which has since been assigned to Braden and Miller as aforesaid) for their damages; which they, the said plaintiffs, had sustained by breach of the covenants contained in said agreement, under seal, theretofore made by the said defendants, whereof the said John Donoghue and Charles Donoghue are convict, as by the record and process thereof, in the said court of common pleas, in the county and State aforesaid remaining, appears, which said judgment still remains in all its original force, strength, and effect, not in anywise reversed annulled, vacated, paid off, or satisfied; and the said plaintiffs have not, nor has either of them, as yet, obtained or sued out any execution of or upon the said judgment, in form aforesaid recovered, whereby, *in view of the fact: 1st, that by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is, in that State, valid and enforceable against Charles Donoghue and void as against John Donoghue, and, in view of the fact, 2nd, that by the law of Pennsylvania any appeal from the judgment so rendered to the supreme court of Pennsylvania (which is the only court having jurisdiction of appeals from the said court of com-*

mon pleas) is required to be made within two years of the rendition of the judgment—nevertheless, no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them—an action hath accrued to the said plaintiffs to demand and have of and from the said Charles Donoghue the said sum of money, being the amount of the damages aforesaid, in form aforesaid recovered, to wit, at the court of common pleas in and for the county of Washington and State of Pennsylvania aforesaid.

And the plaintiffs claim $4,000.

FRED'K J. BROWN,
Attorney for Plaintiffs.

And afterwards, viz., on the twenty-fourth day of February, in the year of our Lord eighteen hundred and eighty-two, the follow-demurrer was filed, to wit:

4 In the Circuit Court for Baltimore County.

HANLEY and WELCH *vs.* CHARLES DONOGHUE.

And the said defendant, by Jno. Yellott, his attorney, comes when &c., and says that the 1st, 2nd, and 3rd counts of the declaration and the matters therein contained in manner and form as the same are above stated and set forth in each one of said counts, and in all of them, are not sufficient in law for the plaintiffs to have or maintain their aforesaid action thereof against this defendant, and he, the defendant, is not bound by law to answer the same; and this he is ready to verify; wherefore, by reason of the insufficiency of the first, second, and third counts of the said declaration, the said defendant prays judgment, and that the said plaintiffs may be barred from having or maintaining *his* aforesaid action thereof against him.

JNO. J. YELLOTT,
E. C. EICHLBERGER,
Att'ys for Defendant.

March 6, 1882. Plaintiffs laid under rule for security for costs. (Docket entry.)

March 11, 1882. Demurrer sustained and judgment for defendant for costs. (Docket entry.)

March 14, 1882. Order of plaintiffs' attorney for an appeal to the court of appeals from the judgment of the court sustaining defendant's demurred filed. (Docket entry.)

Whereupon the court here ordered and directed a transcript of the record and proceedings in the above cause to be made and transmitted to the court of appeals of Maryland.

Which is accordingly done.

Test: WILLIAM M. ISAAC, *Clerk.*

STATE OF MARYLAND, *Baltimore County,* } *To wit:*

I hereby certify that the aforegoing is a full and true transcript of the record and proceedings in the above-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the circuit court of Baltimore county, this twenty-first day of March, A. D. 1882.

[Seal's place.] WILLIAM M. ISAAC,
Clerk of the Circuit Court for Baltimore County.

Plaintiffs' costs	$16	19
Of which	10	50 due cl'k paid.
Defendant's costs	6	75
Of which	1	75 due cl'k paid.

W. M. ISAAC, *Clerk.*

5 *Opinion of the Court of Appeals of Maryland.*

Court of Appeals of Maryland. October Term, 1882.

HANLEY & WELCH *vs.* CHARLES DONOGHUE.

Judge ROBINSON delivered the opinion of the court:

It appears from the pleadings in this case that suit was brought in Pennsylvania against Charles and John Donoghue on a joint contract; that Charles was regularly summoned, but no process of any kind was issued against John, nor did he appear in person or by attorney to the suit. Judgment, however, was subsequently recovered against both defendants, & on this judgment suit is brought in this State against Charles. In support of this action it is contended that the *foreign judgment, although void* as to John, is valid & binding on Charles, the party who was summoned.

At common law a judgment was regarded as an *entire thing*, & being an entirety, it has been held repeatedly that it could not be affirmed as to one or more defendants and reversed as to
6 others. It must either be affirmed as a whole or reversed as a whole. Cutting *vs.* Williams, 1 Salk. 24; Parker *vs.* Harris, 2 Ld. Rayd., 825; Lloyd *vs.* Pearse, Croke Iac., 424; Saunds' Rep., vol. 2, 101; 2 Bac. Alr., 228 Marg.

Thus in an action of trespass against two or more defendants, if one of them died pending the suit & judgment was rendered against all, it was decided that the *entire judgment* must be reversed, & for the reason that being an *entirety* it could not be affirmed in part & reversed in part. 2 Bac. Alr., letter E, 228.

But conceding this to be the law where a judgment is affirmed or reversed on appeal or on a writ of error, the argument is that the rule does not apply to a suit brought upon a foreign judgment recovered against two or more defendants, only one of whom was summoned, & which judgment has been permitted to stand unreversed & unchallenged. In such a case the appellant contends the judgment is valid & may be enforced *against the party summoned* in the original action, though *void as to the parties* against whom no process was issued. Now, in determining this question we must not lose sight of the distinction between *void & voidable judgments*. A judgment rendered by a court having jurisdiction over the subject-matter & the person is unquestionably conclusive & binding on

the parties, unless reversed or set aside in some mode or
7 manner prescribed by law. But it is essential to the validity of a judgment *in personam* that the court should have jurisdiction over the parties, & if rendered without such jurisdiction it is a mere *nullity*. Such a judgment is not merely erroneous because of some irregularity in the mode of proceeding, or error on the part of the court in the application of the law to the particular case for which the party aggrieved must seek a remedy by appeal or writ of error, but being a judgment rendered without jurisdiction it is absolutely void, & may be assailed at all times & in all proceedings by which it is sought to be enforced.

If, then, a judgment could not at common law be affirmed in part & reversed in part because of its *intirety*, for the same reason, if a suit is brought in this State on a foreign judgment, which is admitted to be void as to some of the defendants, such a judgment must be held to be void as to all. The reason of the law is that the judgment is an *entire thing* & cannot be separated into parts. If execution is issued on such a judgment it must be issued against all the defendants.

The question now before us was fully considered in Hall *vs.* Williams, 6 Pick., 232, where a suit was brought in Massachusetts on a judgment recovered in Georgia against two defendants, & it appeared from the record that one of the defendants had never been summoned, & had never appeared in person, or by attorney,
8 to the suit brought against him in Georgia. And it was held, Parker, C. J., delivering the opinion of the court, that the judgment being *entire* if it was a nullity with respect to one, it was a nullity also as to the other defendant. In the still later case of Wright *vs.* Andrews, decided in 1881, 130 Mass., 150, the question was again argued before the court, and the decision in 6 Pickering was approved, Gray, C. J., saying: That if the "court had no jurisdiction of one defendant, its judgment being entire & unqualified, is, in the absence of any evidence of the law of Maine upon the subject, void against both." These decisions have been followed by the courts of Maine, New Hampshire, & in other States. Benner *vs.* Welt, 45 Maine, 183; Rangely *vs.* Webster, 11 N. H., 299; Shuford *vs.* Cain, 1 Abbot (U. S.), 302. In Motteux *vs.* St. Aubin, 2 W. Black, 1133; Ashlin *vs.* Langton, 4 Moore & S., 719; Gerard *vs.* Basse, 1 Dall., 119; Silvers *vs.* Reynolds, 2 Han. (N. J.), 275, courts have permitted judgments on motion, some of them in the exercise of a *quasi* equitable jurisdiction to be set aside as to one defendant & to stand as to others. And in some States it has been decided that a judgment may be valid as to one defendant & void as to others. Douglass' Lessee, *vs.* Massie, 16 Ohio, 271.

The weight of authority is, we think, decidedly the other way, & in accord with the law as laid down in Hall *vs.* Williams, 6 Pickering. Looking at the question from an equitable standpoint purely, there is some force in the appellant's contention that a judg-
9 ment may & ought to be held valid as to parties summoned, & who had an opportunity to make their defences, even though it may be void as to others, against whom no process was

issued. But if it be well settled, & such seems to be the law, that a judgment which is void as to one of the defendants is void also as to the other, the plaintiff, in taking such a judgment, has no one to blame but himself. In bringing suit against two parties on a joint contract, it was his duty to have directed process to be issued against both, & if he failed to do so, & subsequently took a judgment against one of the defendants who never had been summoned, he has no right to complain because the law will not enforce the payment of such a judgment. For these reasons the demurrer to the 2d & 3d counts was properly sustained.

The first count sets forth a judgment regularly recovered against both defendants; the suit is brought, however, against one only, & without any suggestion of the death of the other. Both were, jointly & severally, liable on the judgment, & both ought to have been sued, or some reason alleged why the other was not joined in the action. Merrick *vs.* Bank of the Metropolis, 8 Gill, 59; Kent *vs.* Holliday, 17 Md., 387; Slater *vs.* Magraw, 12 G. & J., 265.

This was decided in Prather *vs.* Manro, 11 G. & J., 261, where, upon a judgment against two defendants, a *scire facias* was issued against the *terre* tenants of one of the defendants only, without suggesting the death of the other, & upon demurrer this defect was held fatal.

Finding no error in the rulings below, the judgment will be affirmed.

Judgment Affirmed.

Judgment was affirmed in this case on the 19th day of January, 1883, and execution awarded for the sum of $6.75 costs in the circuit court for Baltimore county, and $32.20 costs in the court of appeals of Maryland.

To the Honorable James L. Bartol, chief judge of the court of appeals of Maryland:

The petition of Michael Hanley and William F. Welch respectfully represents:

That a final judgment has been rendered by the court of appeals of Maryland in a suit therein pending, wherein Michael Hanley and William F. Welch are plaintiffs of record, and Charles Donoghue is defendant of record.

That the court of appeals aforesaid is the highest court of law in the State of Maryland in which a decision in the said suit could be had.

That in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioners under such Constitution and statutes.

All of which appears upon the face of the record accompanying this application.

Wherefore, to the end that the said judgment may be re-examined

and reversed in the Supreme Court of the United States upon
12 a writ of error, your petitioners pray that a writ and that a citation may issue in the same manner as if the said judgment had been rendered in a circuit court of the United States.

FRED'K J. BROWN,
Counsel for Hanley & Welch, Plaintiffs.

The above petition is granted, and a writ of error is allowed as therein prayed.

JAS. L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

March 23d, 1883.

13 The United States of America to Charles Donoghue, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Maryland, wherein Michael Hanley and William F. Welch are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James L. Bartol, chief judge of the court of appeals of Maryland, this twenty-third day of March, in the year of our Lord one thousand eight-hundred and eighty-three.

JAS. L. BARTOL,
Chief Judge of the Court of Appeals of Maryland.

Service of copy of the foregoing citation admitted this 27th day of March, 1883.

EDWARD C. EICHELBERGER & JOHN J. YELLOTT,
Attorneys for Charles Donoghue.

14 THE UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the honorable the judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Michael Hanley and William F. Welch, appellants, and Charles Donoghue, appellee, wherein was drawn in question the construction of a clause of the Constitution or statute of the United States, and the decision was against the right or privilege specially set up or claimed under the said clause of the said Constitution or statute, a manifest error hath happened to the great damage of the said Michael Hanley and William F. Welch, as by their complaint ap-

pears, we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
15 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[The Seal of the Circuit Court, Maryland.]

JAS. W. CHEW,
Clerk Circuit Court U. S.

Allowed by the Hon. Jas. L. Bartol, chief judge of the court of appeals of Maryland.

16 STATE OF MARYLAND, }
City of Annapolis, } *To wit:*

I, Spencer C. Jones, clerk of the court of appeals of Maryland, at Annapolis, in obedience to the mandate of a writ of error awarded by the Honorable James L. Bartol, chief judge of the court of appeals of Maryland, bearing date the 23d day of March, 1883, do hereby certify that the foregoing record is a true transcript of the record and proceedings in the case of Michael Hanley and William F. Welch *vs.* Charles Donoghue, as the same remains on file in the clerk's office of the said court of appeals.

And I do further certify that the said court of appeals is the highest court of law or equity in said State in which a decision can be had in said case.

And I do further certify that the foregoing writ of error in said record is a true copy of said writ awarded by the said the Honorable James L. Bartol, chief judge as aforesaid, to the judgment of said court, and I herewith transmit the original of said writ. And I do further certify that a copy of said writ was duly filed in my office on the 28th day of March, 1883.

17 And I do further certify that the copy of the opinion of the court of appeals in said record is a true copy of the same as rendered by said court in said case and on file in my office, and that said judgment in said court of appeals in said case was rendered on the 19th day of January, 1883.

In testimony whereof I have hereunto subscribed my name as clerk of the said court of appeals of Maryland and affixed the offi-

cial seal of said court, at my office, in Annapolis, Maryland, on the 28th day of March, 1883.

[Seal Court of Appeals, Maryland.]

SPENCER C. JONES,
Clerk Court of Appeals of Maryland.

Cost of transcript, $5.00.

[Endorsed:] Michael Hanley and William F. Welch vs. Charles Donoghue.

Endorsed on cover: Maryland court of appeals. No. 229. Michael Hanley and William F. Welch, plaintiffs in error, vs. Charles Donoghue. Filed 25th May, 1883.

116-1

MICHAEL HANLEY
AND
WILLIAM F. WELCH
vs.
CHARLES DONOGHUE.

Supreme Court
OF THE
United States.
OCTOBER TERM, 1885.

No. 229.

—o—

MOTION TO ADVANCE.

—o—

The plaintiffs in error in the above entitled case refer to their motion to advance, which, on March 2d, 1885, was filed in these proceedings, and they now file this their motion, again asking that this honorable Court will advance this case, and for reasons why it should be advanced, they respectfully show:

That this case presents the same *federal question* which was raised in the case of *Renaud vs. Abbot*, No. 239 on the docket of the last term of Court, which was argued on April , 1885, and has not yet been decided by this honorable Court.

The question may be stated thus:

A judgment is rendered in Pennsylvania against A and B, one of whom, A, is summoned, and the other, B, is not

summoned, and afterwards in Maryland an action of debt on judgment is brought against A on the Pennsylvania judgment, the declaration (which is demurred to) averring that "by the law and practice of Pennsylvania the judgment so rendered is in that State valid and enforceable against A, and void as against B;"—*quaere*, can the Maryland court decide that the judgment is void as against A, or would such a decision be in conflict with the "full faith and credit" clause of the Constitution of the United States?

Plaintiffs in error beg leave to suggest that the federal question raised in both cases is one of some difficulty and importance, and that it may possibly conduce to the satisfactory determination of it, that it should now be considered in the somewhat simpler form in which it is presented by this Maryland case, before the more complicated case from New Hampshire, *Renaud vs. Abbot*, is decided.

Respectfully submitted by

FRED'K J. BROWN,
For Plaintiffs in Error.

I make no objection to the advancement of this case if this honorable Court shall deem it advisable and proper to advance it.

EDW'D C. EICHELBERGER,
Counsel for Defendant in Error.

116-1

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

No. 511.

MICHAEL HANLEY AND WILLIAM F. WELCH

vs.

CHARLES DONOGHUE.

MOTION TO ADVANCE.

FRED'K J. BROWN,
Of Counsel for Plaintiff in Error.

MICHAEL HANLEY

AND

WILLIAM F. WELCH

VS.

CHARLES DONOGHUE.

Supreme Court

OF THE

United States.

OCTOBER TERM, 1884.

—

No. 511.

MOTION TO ADVANCE.

The plaintiffs in error in the above entitled case file this their motion asking that this honorable Court will advance this case so that it may be heard immediately after the hearing of Renaud vs. Abbott, No. 239 on the docket of this term, and for reasons why this case should be advanced they respectfully show:

That the same *federal question* is raised in the two cases; that the question is an important one and not free from difficulty; and that, although the decisions of the state courts involving this question began so long ago as 1828, this is the first time that it has been brought up for the consideration of this honorable Court.

The question now raised may be stated thus:

A judgment is rendered in Pennsylvania (for the sake of definiteness the circumstances are stated as they arose in the case of Hanley vs. Donoghue), against A and B, one of

whom, A, is summoned, and the other, B, is not summoned; and afterwards in Maryland an action of debt on judgment is brought against A on the Pennsylvania judgment, the declaration (which is demurred to) averring that "by the law and practice of Pennsylvania the judgment so rendered is in that State valid and enforceable against A and void as against B;"—*quaere*, can the Maryland court decide that the judgment is void as against A, or would such a decision be in conflict with the "full faith and credit" clause of the Constitution of the United States?

The same question is raised in Renaud vs. Abbott by the decision of the Supreme Court of New Hampshire, A being sued in that State upon a similar judgment rendered in Louisiana against A and B, of whom B was not summoned.

While the same question comes up in both cases, it is presented in Hanley vs. Donoghue *in a simpler form*, not complicated with the intricate pleadings which make part of the record in Renaud vs. Abbott, nor with difficult questions of estoppel, of succession of parties, and other questions, which must be considered in that case. The great intricacy of the pleadings in Renaud vs. Abbott, and the way in which the federal question is complicated with others, will be at once apparent on examination of the record of that case and of the briefs filed.

Counsel for plaintiffs in error, in making this motion for advancement, submits that it will probably be *for the convenience of the Court that the two cases should be heard one after the other*, and suggests that if they are heard thus in succession, a large part of the argument of the second case will have been anticipated by the presentation of the first, that many of the same authorities are relied upon in the decisions of the two cases below, and will be cited in argument here, and that it will conduce to the satisfactory determination of the important federal question, that it should be considered at the same time in the slightly different phases which it presents in the two cases,

the more complicated case from New Hampshire, and the simpler case which comes up from the Court of Appeals of Maryland.

The leading case upon the subject is *Hall vs. Williams*, 6 Pickering, 232, decided in 1828, where the Supreme Court of Massachusetts thus briefly disposed of the question: "The judgment being entire, if it is a nullity with respect to one, it is also in the whole;"—and this case has been relied on and followed in Maine, New Hampshire, and (recently) in Maryland, as authority to settle the question whether the summoned defendant, in a judgment such as has been mentioned, can be sued in another State on that judgment; but plaintiffs in error contend that that case (and those which follow it) can be shown to involve a contradiction of principles which have been laid down by many courts, and which are supported by weighty considerations. An endeavor to show this was made in an article published in the American Law Register, for November, 1880 (before the suit of Hanley vs. Donoghue was brought) to which counsel for plaintiffs in error with diffidence begs leave to refer, and he refers, more confidently, to a recently published note by Mr. A. C. Freeman, which follows the authorities and adopts the conclusions of that article. The learned author, in his work on Judgments (section 136), citing the case of *Buffum vs. Ramsdell*, 55 Maine, 252, repeated substantially the statement of the law which is given in *Hall vs. Williams*, but he has now changed his views upon this subject, and in the 32d volume of American Decisions (published in 1882) he has, at page 604, appended to the case of *St. John vs. Holmes*, 20 Wend. 609, a careful note in which he *very emphatically rejects* the doctrine of *Hall vs. Williams*.

Mr. Freeman says: "The principal case is necessarily in conflict with that line of authorities which assert and enforce the proposition that a judgment is an entirety, and

at liberty to mention the marked change in the views of the leading text writer on the subject of Judgments, as an indication that the question which is to come before this honorable Court is one of some difficulty, and the fact that it is a *federal* question is alone enough to show that it is one of importance.

Respectfully submitted by

FREDK J. BROWN,

For Plaintiffs in Error.

I make no objection to the advancement of this case, if this honorable Court shall deem it advisable and proper to advance the same; reserving, however, all proper exception to any arguments contained in the motion for advancement which is about to be filed by the Counsel for Plaintiffs in Error.

EDWD C. EICHELBERGER,

Counsel for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 229.

MICHAEL HANLEY AND WILLIAM F. WELCH,

PLAINTIFFS IN ERROR,

vs.

CHARLES DONOGHUE.

BRIEF FOR PLAINTIFFS IN ERROR.

FRED'K J. BROWN,

Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 229.

MICHAEL HANLEY AND WILLIAM F. WELCH,
PLAINTIFFS IN ERROR,

vs.

CHARLES DONOGHUE.

Brief for Plaintiffs in Error.

This is an action of debt on judgment—a foreign judgment sued on in Maryland—that is to say, one rendered in the Court of Common Pleas of Washington County, Pennsylvania. There were two defendants in a suit instituted in that court; one of them was summoned and the other was not; judgment was rendered against both of them; and *one* of these defendants was afterwards sued in the Circuit Court for Baltimore County. There are three counts in the declaration—the second and third being those which principally need to be considered. The second count declares on a judgment obtained in "a certain other action," which, as there described, is shown to have been in some respects *irregular*,—that is to say (briefly), because A had and B had not been summoned in the Pennsylvania suit; and the third count declares also on "a certain other" irregular action, setting forth first (as in the second count) the failure to summon B, and setting forth also that by the law and practice of Pennsylvania the judgment is there valid and enforceable against A, though void as against B, and also that the time allowed in Pennsylvania for an appeal had already elapsed before suit was

brought in Maryland. Defendant demurred to all the counts, the Circuit Court sustained his demurrer, and plaintiffs appealed to the Court of Appeals of Maryland, which in January, 1883, affirmed the judgment below. The decision is reported in 59 Md. 239. A writ of error was then prayed to the Supreme Court of the United States, on the ground that the "full faith and credit" clause of the Constitution, which had been relied on and urged below, had been disregarded.

The federal question now raised had never been brought directly before this Court for a decision until the term just past, although at intervals for more than fifty years cases involving this question have been decided in the State courts, the leading case being *Hall* v. *Williams*, 6 Pickering 232, decided in 1828. In April 1885, however, the case of *Renaud* v. *Abbot*, from New Hampshire (s. c. *Wilbur* v. *Abbot*, 60 N. H. 40), presenting this question, was argued in this Court, and now awaits decision. By an order recently passed, after petition filed to that effect, the Court has directed this case of *Hanley* v. *Donoghue* to be advanced.

The federal question is presented in this Maryland case in a simpler form than in the New Hampshire case, where the pleadings are long and intricate. Moreover, in that case there are questions of estoppel and of succession of parties, and it is even contended by the defendant in *Renaud* v. *Abbot* (1st point in his brief) that *the federal question is not raised in that case*, while there is no dispute that this case turns entirely upon it.

The federal question comes up necessarily in the consideration of the second of the two following propositions, which might with more logical correctness be called the proposition and the corollary deducible from it.

I. A judgment against two is not necessarily an entirety: it may be avoided as to one—or held to have been void *ab initio* as to one—and *yet stand good as to the other.*

II. A judgment is rendered in Pennsylvania jointly against two defendants, A and B, one of whom, B, was not summoned:

it is not appealed from, and it is admitted that the judgment is in Pennsylvania valid and enforceable against A, though void as against B;—under the "full faith and credit" clause of the Constitution, A can be sued on this judgment in another State.

For a discussion of these propositions, counsel for plaintiffs in error begs leave to refer to an article published in the American Law Register, for November, 1880, before the suit of *Hanley* v. *Donoghue* was brought. It is perhaps proper to add that the article as at first published was meant to discuss a debatable question, and not to serve as a brief in a case which he had not then any definite intention of instituting, and that the article was afterwards reprinted with some omissions and some slight additions and changes in point of arrangement and order of argument, the principal change being a more consecutive treatment of the New York cases and a more confident reliance upon them, particularly upon the case of *Reed* v. *Pratt*, 2 Hill 64, which had been overlooked. Meantime there had been published by Mr. A. C. Freeman, in the 32d volume of his American Decisions, a long and careful note, to which counsel begs leave to refer. The learned author in his work on Judgments (section 136), citing the case of *Buffum* v. *Ramsdell*, 55 Maine 252, had repeated substantially the statement of the law which is given in *Hall* v. *Williams*, but he has since changed his views upon this subject, and in the note mentioned (published in 1882), 32d American Decisions, p. 604, he *very emphatically rejects* the doctrine of that case.

As the questions now before the Court have recently been fully and ably argued in *Renaud* v. *Abbot*, and as all that counsel for plaintiffs in error would now urge by way of argument is contained in the reprinted article from the American Law Register and in Mr. Freeman's note above mentioned, counsel ventures to hope that the submission herewith of copies of that article and the following citation from the note will be considered a sufficient, although unusual way of presenting the views for which he contends.

Mr. Freeman says: "The principal case* is necessarily in con-

* That is to say, *St. John* v. *Holmes*, 20 Wend. 609, the case to which the learned author here appends his note.

flict with that line of authorities which assert and enforce the proposition that a judgment is an entirety, and if void as against one defendant is void as against all. This proposition has certainly been accepted and applied by very eminent judges. We propose to examine the cases in which it has been distinctly announced, and examine its foundations for the purpose of ascertaining whether they are sound either in precedent or in principle. We believe the first case upon this subject is that of *Hall* v. *Williams*. . . . . This question was very summarily dealt with. 'The judgment being entire, if it is a nullity with respect to one, it is also in the whole.' This is all the court thought proper to say upon the subject; and it is the substance of everything which has been said from that time down to the present. For authority the court relied upon *Richards* v. *Walton*, 12 Johns. 434. Now this case of *Richards* v. *Walton did not involve any similar question*." &c.

. . . "We know of nothing which has caused so much confusion and misapprehension as the failure to discriminate between voidable and void proceedings—between those proceedings which result from an erroneous exercise of jurisdiction, and those which take place in the absence of any jurisdiction whatever. Every lawyer knows, or at least ought to know, that the existence of errors which demand the reversal of a judgment upon appeal or writ of error, by no means warrants the treatment of such judgment as void. Yet in *Hall* v. *Williams*," &c., &c.

"If, as we think, *Hall* v. *Williams*, and all the subsequent cases in harmony with it upon this subject, rest upon *Richards* v. *Walton*, and *Richards* v. *Walton* is no authority either way, then, so far as authority is concerned, we think there is substantially none in favor of the position that a judgment void as to one defendant is necessarily void as to all. If the court in Massachusetts really desired to seek advice from those in New York, it might have there found decisions directly in point." &c.

The note then cites some of the New York cases, and also *Mottenx* v. *St. Aubin*, 2 W. Black. 1133; *Ashlin* v. *Langton*, 4 Moore and S. 719; *Gerard* v. *Basse*, 1 Dall. 119; *Silvers* v. *Reynolds*, 2 Harr. (N. J.) 275; *the York Bank's Appeal*, 36

Pa. St. 458; *Douglass's Lessee* v. *Massie*, 16 Ohio 271, and other cases mentioned in the Law Register's article; and cites also (upon the point in support of which they were quoted), some other very pertinent cases.

. . . "The authorities heretofore cited show that the courts of Massachusetts, Maine and New Hampshire are fully and perhaps unalterably committed to the doctrine that a judgment is an entirety, and if void against one of the defendants is void as to all. . . . We believe it to be without any other support than the authority of those eminent courts, which, through what we conceive to be either a misapprehension of a prior decision, or of the real nature of the question in issue, pronounced in its favor. We say misapprehension of the question in issue, because the courts seemed to treat it as a mere question of error, and not of power, and to assume that if error was shown, the judgment was void.

. . . "The argument upon one side of this subject is usually expressed substantially as follows: 'The judgment is entire, and if void as to one defendant, where there are several, it is void as to all.' . . . This sentence is terse, perspicuous and dogmatic. But is it logical? Is there anything in a judgment which necessarily prevents its being enforced against one defendant without affecting the others? Is there any such personal unity of judgment debtors as pertains to tenants by the entireties, each of whom is incapable of acting without the other? There certainly is not." . . .

Counsel begs leave to submit the following considerations with reference to the case of *Renaud* v. *Abbot* on one point in which it differs from *Hanley* v. *Donoghue*. In that case defendant's counsel contends earnestly, and (it is submitted) very reasonably, that *there is no federal question in the case* (first point in his brief), for the reason that the Louisiana judgment sued on was not an *irregular* judgment, but a *fraudulent null and void* judgment, to which the constitutional clause does not apply, as it must not be invoked in favor of *such* judgments to give an extra-territorial faith and credit to that which—*on the*

first principles of justice—is entitled to no credit or respect at home. I have little to add to what is there urged as to this important aspect of that case, except to suggest that while the learned counsel for defendant in that intricate case seems to have overlooked no other point in it, he perhaps failed at an earlier stage of the case to appreciate the importance of raising, through a special plea to that effect, the point which he now makes as the first point in his brief. There can be no doubt that the defendant in New Hampshire would have prevailed on a special plea falsifying the Louisiana record, and showing that the judgment which *purported* to have been rendered in a suit in which A was summoned and B was not, was *really* rendered in a suit where *neither* was summoned. The learned counsel probably relied on the New Hampshire court being already so completely committed to the *Hall* v. *Williams* doctrine, that it was not worth while to rest the case on the still stronger defence which lay back of that doctrine,—the "first principles of justice" defence which the special plea would have raised. But I respectfully submit that (as the learned counsel now argues), although this was not specially pleaded in New Hampshire, and although the New Hampshire judgment was rested on a different ground, that need make no difference to this Court now. The *fact* staring them in the face from the Louisiana record, which the New Hampshire court might have seen but did not, "this Court will allow itself to see. The fact that there was no jurisdiction is fundamental," and is conclusive of that case.

I would venture also to add the following authorities to those which the learned counsel cites on the first point in his brief. Many more might be adduced if necessary.

In *Thurber* v. *Blackbourne*, 1 N. H. 242, the court considered the effect of the "full faith and credit clause" upon judgments rendered in another State *without notice:* Such judgments are rendered in violation of the first principles of justice. . . Were judgments so obtained in one State to have the effect of domestic judgments in every other State, the most mischievous consequences would ensue. . . Such foreign judgment is a mere nullity, and does not afford even *prima facie* evidence of a debt.

See also *Whittier* v. *Wendell*, 7 N. H. 257.

And in *Folger* v. *Columbian Ins. Co.*, 99 Mass. 267, the court says: The article of the Constitution of the United States which requires full faith and credit to be given in each state to the judicial proceedings of every other state, does not preclude the inquiry whether any judgment obtained in another state and relied on in this was rendered by a court having jurisdiction of the cause and of the parties. *Hickey* v. *Stewart*, 3 How. 762; *D'Arcy* v. *Ketchum*, 11 How. 165; *Carleton* v. *Bickford*, 13 Gray 591. If the court was one of general jurisdiction, the presumption indeed is in favor of the validity of its proceedings. *Harvey* v. *Tyler*, 2 Wall. 328; *Knapp* v. *Abell*, 10 Allen 485. But this presumption is not conclusive; and it is always competent to show that the court had not jurisdiction of the cause. *If it had not, there is no judicial proceeding.*

In other words, the New Hampshire case and the Maryland case in one most important particular differ so widely that this Court may perhaps decide that case without touching upon or getting so far as the *Hall* v. *Williams* doctrine, while in this case (it is submitted) that doctrine will have to be considered and distinctly passed upon. But if this Court refuses to adopt the suggestion just made, and determines that *Renaud* v. *Abbot* cannot be disposed of without either accepting or rejecting what was laid down in *Hall* v. *Williams*, I should contend, of course, that both in the New Hampshire case and in this case that doctrine should now be rejected.

It is important that this Court should now lay down a rule which shall settle this federal question, and (it is respectfully submitted) settle it on broad and equitable grounds. The Pennsylvania judgment now before the Court, irregular though it may be as to the form of its rendition, is yet admitted to be a valid and enforceable judgment in that State. Is it not more in accordance with both the letter and the spirit of the Constitution that that judgment should be held good to sue on in Maryland, than that the Maryland courts should nullify it by sticking in the bark of a technical difficulty which the Pennsylvania courts disregard and ignore?

FREDERICK J. BROWN,
Counsel for Plaintiffs in Error.

VOIDABLE

AND

VOID JUDGMENTS.

An Article published in the American Law Register,
of November, 1880.

REPRINTED

WITH SOME SLIGHT CHANGES AND ADDITIONS.

BALTIMORE.
Press of Isaac Friedenwald.
1885.

VOIDABLE AND VOID JUDGMENTS.

What is the difference between voidable and void judgments?

Can a judgment against two defendants be void as to one of them, and only voidable (that is to say valid), *as against the other?*

A judgment is rendered jointly against two defendants, one of whom was not summoned, and it is allowed to stand unreversed: Is it void *as against the summoned defendant? Can he be sued on it in another State? and how?*

I. The law on this subject as laid down by the Courts of Maine, New Hampshire and Massachusetts.

Hall v. *Williams*, 6 Pick. 232, decided in 1828, has been generally regarded as the leading case on these questions. This was an action of debt, instituted in Massachusetts upon a judgment recovered against two defendants, in the Superior Court in Georgia, and the points which the case presented may be thought to deserve a fuller consideration than they received then, or in later cases where they have arisen.

By the record it appeared that the plaintiffs brought suit in Georgia, in May, 1824, against Williams and Fiske, as late copartners trading under the firm name of E. Williams & Co.

The officer's return, dated May 4th, 1824, was as follows: "I have served a copy on Edward Williams; Abijah Fiske not to be found in the county." The plea, filed July 15th, 1824, was: "And the said Edward Williams, by William W. Gordon, *his* attorney, comes, &c., and saith that *he* did not undertake," &c. In another part the record states: "Afterwards, to wit, on, &c., came the within named Henry Hall, &c., as well as the within named Edward Williams and Abijah Fiske within named by *their* attorney within named, and the jurors, &c., upon their oaths say, &c. Therefore, it is considered that the said Henry Hall, &c., do recover against the said Edward Williams and Abijah Fiske, the damages aforesaid," &c.

After passing upon certain points in pleading presented by the case, the Supreme Court of Massachusetts, while apparently conceding that the defendants would have been estopped by the record, if it appeared thereby "that the defendants had notice of the suit or that they appeared in defence" (p. 239), goes into a discussion of the

conclusiveness of judgments obtained against a defendant who is not, or defendants who are not summoned, a discussion into which we need not follow the court, for it is well settled that when this fatal irregularity appears upon the face of the proceedings, the judgment has no binding effect in the courts of another State. "In the courts of another State"—so the doctrine is generally expressed—but as the reason for regarding such judgment as invalid, is because "to hold a defendant bound by such judgment is *contrary to the first principles of justice*," it is obvious, as Mr. Justice FIELD pointed out in *Pennoyer* v. *Neff*, 95 U. S. 714, 732, that the judgment is equally a nullity, and is entitled to the same disrespect, "in the State where rendered." If early authority be needed for the injustice of such judgments, we certainly get back to "first principles," in the case of *The King* v. *The Chancellor, &c., of Cambridge University*, 1 Strange 557, where Mr. Justice FORTESCUE says, "The laws of God and man both give the party an opportunity to make his defence, if he has any," and cites the case of Adam, upon whom sentence was not passed, before he was called upon to make his defence. "Adam, where art thou? Hast thou not eaten," &c., * * * "And the same question was put to Eve also."

To this rule as to the invalidity of a judgment against an unsummoned or non-appearing defendant, there is an exception as widely recognized as the rule itself, which may as well be mentioned here, and that is that a citizen, or even a resident of any country, being bound by its laws, cannot complain if judgment has been recovered against him when he has been sued according to such process as may be provided by law, although actual summons or appearance be not included in that process. There are many cases in the English reports where this principle has been laid down, the suits having been brought upon judgments obtained in some foreign or colonial court, and it has been decided by the courts of the different States often enough to make a citation of authorities needless. We may pass from this statement of the *general rule*, and of the *exception* to it, without further discussion, nor need we reopen the question as to the *conclusiveness* of a record's recital that the defendants were summoned or appeared in defence, for it has been settled, since the decision of *Hall* v. *Williams*, that such recital is not conclusive.

But it is plain that the case which the court had to decide, was very different from those cases in which judgment has been rendered against a *sole* defendant unsummoned or not appearing, or against two or more defendants, *all* unsummoned or not appearing. Here *one* of the defendants had been summoned and had duly appeared by

his attorney. So far as any "first principles of justice" are concerned, the judgment in this case was good as to Williams (if a judgment *can* be good as to one and bad as to another), while it was clearly bad as to Fiske. If some other principle was to be applied, we should look for an ampler exposition of it, or stronger authorities in its support, than the court, after dwelling at some length upon "universal principles of justice" (p. 240), saw fit to give.

"It appears by the record," says the court, p. 246, "that the attorney appeared for Williams only, and there is no plea filed but for Williams. There is nothing therefore in the record which is contradicted by the second and third pleas,[1] and the replication by estoppel is therefore bad and the plea [*sic*] good, which settles the case in favor of the defendants, unless"—here we come to the important point—"unless the judgment can be sustained against Williams alone, and this writ can be amended by striking out Fiske; but such an amendment would not help the case, for *the judgment being entire, if it is a nullity with respect to one, it is also in the whole: Richards* v. *Walton*, 12 Johns. R. 434." This is the beginning and end of the discussion of the point.

Only one case is cited as an authority for the law thus briefly laid down, and that case is found on examination to be not applicable.

For a mere statement of the case of *Richards* v. *Walton*, one of a large class, of which several typical cases were relied on by defendants in argument (p. 237), will show that it does not sustain the doctrine which it was cited to support. "The defendants below were sued by warrant in trespass for cutting timber; the constable returned to the warrant, that the same was served agreeable to law; but only brought [A.] before the justice, no reason appearing why the other defendant was not brought. [A.] pleaded and demanded an adjournment, but * * * it was denied, and the justice gave judgment against both defendants." On a writ of error to the Supreme Court: "PER CURIAM. * * * The proceedings against [B.] were clearly erroneous; where a party is prosecuted by warrant, the justice has no authority to proceed unless the defendant appears in court. * * * As the judgment is against both and entire, it must be reversed."

This doctrine, which the Massachusetts court was then applying—and perfectly sound doctrine it is, but not applicable to the case before them—is to be found thus stated in Bacon's Abridgment,

[1] This seems to be very inaccurate. The record does not contradict the third plea, that Fiske was never summoned nor appeared, but it *does* contradict the second plea, that *neither* of the defendants was summoned nor appeared.

tit. *Error.* "Where, on the Writ of Error, Part only or the whole Judgment shall be reversed. A judgment, being an entire thing, cannot regularly be reversed for part, and affirmed for part." Several instances are given, for example: "In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all."

This is elementary law, which could not be successfully controverted, and it has been followed without question in very many cases. Among earlier cases may be cited *Curtis* v. *Patton*, 6 S. & R. 135; *Cole* v. *Pennell*, 2 Randolph 174. Among later cases on the subject, are *Benner* v. *Well*, 45 Me. 483; *Donnelly* v. *Graham*, 77 Penn. St. 274; *Smith's Adm'r* v. *Rollins*, 25 Mo. 408; *Covenant, &c., Co.* v. *Clover*, 36 Mo. 392.[1]

Now it is one thing to say that *on an appeal or a writ of error to a higher court in the same State*, the judgment shall not "be reversed for part and affirmed for part," but "shall be reversed *in toto* as against all;" but where a judgment has been rendered against two or more defendants, only one of whom was not summoned, and no writ of error is sued out, nor appeal taken, and the judgment is allowed to stand unchallenged, and *suit is afterwards brought on it in another State*, it is quite a different thing to say that the defendants properly summoned, &c., who might have appealed on account of the irregularity as to their co-defendant, but failed to do so, may rely on such irregularity as a fatal bar to the suit in the court of another State, and that such court must treat the judgment *as to them also*, as an absolute nullity. The Massachusetts court passed *per saltum* from one of these propositions to the other, but it is respectfully submitted that a wide gap separates them, although the highest courts of several other States, following the Massachusetts case, seem to have found it an easy leap across.

Before discussing the decisions which follow the doctrine of *Hall* v. *Williams*, it may be interesting to give a brief history of the later stages of that case as it was afterwards presented to the Supreme Court of Maine.

It appears that on January 19th, 1829, some years after the judgment was rendered in the Georgia court, and after the unfavorable

[1] *Contra*, *Kitchens* v. *Hutchins*, 44 Ga. 620, and *Kelly* v. *Bandini*, 50 Cal. 530, which may safely be disregarded. The curious case of *Shirley* v. *Lunenburgh*, 11 Mass. 379, is quite exceptional in the aspect it presented. The technical rule which the court thought binding in *Hall* v. *Williams*, could hardly have been stretched so as to cover this earlier case.

decision by the Massachusetts court, on the motion of the plaintiffs' attorney in the Georgia court (notice being served on the attorney of record to the defendant Williams) it was ordered by the Georgia court that the judgment be amended, and that the plaintiffs have leave to enter judgment *nunc pro tunc* against Williams alone, which was done. Thereupon the plaintiffs brought, in Maine, an action of debt on a judgment *as rendered against the defendant Williams alone* by the Georgia court, and after elaborate pleadings on both sides, presenting some interesting points which need not be discussed here, the Supreme Court decided that the defendant's plea (that the judgment was rendered against himself and one Fiske jointly) was bad, and sustained the plaintiffs' demurrer.[1]

This was in 1832, and the case is found in 8 Me. 434. The case came again before the same court the next year, when *nul tiel record* was pleaded, and issue joined, and the court held (in this suit founded on the *amended* judgment), that while the original judgment was erroneously entered up against Fiske, the court was bound by the Constitution to give full faith and credit to the record as amended, and judgment was accordingly rendered against the now sole defendant Williams: *Hall* v. *Williams*, 10 Me. 278.

Returning to the consideration of the point under discussion, we find that the doctrine of the Massachusetts case of *Hall* v. *Williams* was followed by the Supreme Court of New York in *Holbrook* v. *Murray*, 5 Wend. 161 (1830), the court basing its decision upon the Massachusetts case and also on the case of *Richards* v. *Walton*, 12 Johns. 434, where "this precise point was decided," though we have seen that the point decided was essentially different. But this decision is inconsistent with *Green* v. *Beals* and other New York cases mentioned below, and must be regarded as *overruled* by *Read* v. *Pratt*, *infra*, which is directly contrary to *Hall* v. *Williams*.

In New Hampshire the doctrine of *Hall* v. *Williams* was adopted in *Rangely* v. *Webster*, 11 N. H. 299, (1840), and it is still upheld in that State.

The Supreme Court of Maine followed, deciding in *Buffum* v. *Ramsdell*, 55 Me. 252 (1867), that "the judgment being an entirety, if void in part is void in all." &c., and held that such a judgment ~~is erroneous~~, and will not sustain a levy made upon the real estate of one defendant if the other was not an inhabitant of the State, and no legal service was made upon him. No new authorities of any value are cited, and the two Maine cases quoted, *Penobscot R. R.* v. *Weeks*, 52 Me. 456, and

[1] There is a mistake in the last line of the report of the decision, p. 437—not corrected in the list of *errata*,—*overruled* being printed instead of *sustained*.

Benner v. *Well*, 45 Me. 483, have no bearing upon the point which we are now considering.

To return to the Massachusetts cases. *Knapp* v. *Abell*, 10 Allen 485, maintains the absolute invalidity of the judgment, when the defendant who had been summoned, is sued upon it in another State. This case relies upon *Hall* v. *Williams* and *Rangely* v. *Webster*.

Bissell v. *Briggs*, 9 Mass. 462, decided in 1813, has been sometimes relied upon as an authority for the inconclusiveness of a judgment of a court of another State: "If it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment" (p. 467), but as it plainly appeared that the jurisdiction of the New Hampshire court had been properly exercised in giving judgment against the defendant, and the Massachusetts court pronounced judgment accordingly, the remark just quoted, however correctly it may state the law, is only *obiter*.

Hendrick v. *Whittemore*, 105 Mass. 23, is an instructive case, which if not directly in point, is very near being so. This was an action for contribution, brought by one against the other of two sureties on a bail-bond, the full payment of which had been enforced against the first by an execution issued on a writ of *scire facias* upon the bail-bond. The defence taken was that the writ of *scire facias* was defective in that it directed the officer to summon the two defendants therein to appear, &c., without specifying *at what hour* of the day; that consequently the judgment rendered upon their default was not binding, and the plaintiff if he paid it could not hold the defendant to contribution. The court, in its discussion of the case, recognized a "distinction between erroneous proceedings which are to be treated as void, and those which are voidable only." (P. 28.)

"Many considerations favor the rule that judgments of a court of competent jurisdiction which are erroneous by reason of defect of process, or insufficiency or want of service, can be impeached by parties thereto only by proceedings instituted directly for that purpose. The plaintiff is concluded by such judgment. His demand is merged in it. He cannot treat it as a nullity, and proceed again upon his original demand as if no such judgment had been rendered. He can only proceed by levy of execution, or by suit upon his judgment. If the defendant may defeat any proceeding in either mode, the plaintiff is left remediless, unless he, too, may regard the judgment which he has obtained as absolutely void." (P. 29.)

But the court has just told us that he *cannot* so regard it. The court here addresses itself to an adjustment of the rights between two *defendants* resulting from the *voidable but not void* judgment

against them, but its reasoning is just as applicable to the question of the plaintiff's rights under such a judgment.

The plaintiff is concluded by such judgment; *he* cannot treat it as a nullity; his voidable but not void judgment is *so far good* as to keep him out of any other remedy except through and by means of it; shall he be told that it is just good enough to prevent his having any remedy at all?

Henderson v. *Staniford*, 105 Mass. 504, which relies upon *Hendrick* v. *Whittemore*, says still more emphatically: "A judgment obtained without legal notice or service of process upon the defendant, there being no other objection to the jurisdiction of the court rendering it, is voidable only, not void." This case is not strictly applicable to the point under discussion, for it was a ~~suit on~~ judgment rendered against a *sole* defendant, who was a citizen of California temporarily absent from the state; the plaintiff commenced an action upon a promissory note against him in the county where he had resided, notice being duly given by publication, and judgment was rendered, which was never reversed or annulled, but was valid and in full force in California. The plaintiff afterwards brought suit *on the note* against the defendant in Massachusetts, and the court held that he could not sue upon the original demand. All that the court really had to decide was that the defendant *being a citizen of California*, and sued according to the process provided by its laws, the judgment against him was *good*, and the plaintiff must sue *upon the judgment*, so that the discussion of the effect of judgments which "defendant has not attempted to avoid" seems rather uncalled for, inasmuch as this was a judgment which defendant could not have avoided if he had tried.

The case of *Stockwell* v. *McCracken*, 109 Mass. 84, is still more noteworthy in its recognition of a distinction between voidable and void judgments, and (as it seems) in its departure from the strict line of the *Hall* v. *Williams* case in 6 Pickering. Here the plaintiff, having recovered judgment in California against A. and B. jointly, of whom A. had been summoned and B. notified by publication, brought suit in Massachusetts against both of them upon the judgment, discontinuing it, however, as to B. A. was a citizen of California, and B. is also taken to have been a citizen of that State, as the contrary did not appear, so that, under principles well enough established, there was really no difficulty about the jurisdiction. The court also disposed of another defence, namely, that sufficient time, as required by the California statute, had not elapsed before the entering up of the judgment, and decided that the California court

must be held to have passed upon that question in rendering the judgment, and that its decision thereon was conclusive. The court adds, however, this discussion of the effect which an irregularity might have: "But if an irregularity were shown to exist, we are referred to no statute or rule of law in California, under which the judgment would thereby be rendered void, or even voidable by [A]. The presumption from the law, as it exists here, would be otherwise. And if voidable, both defendants being citizens of California and subject to the jurisdiction of its courts, it is not at all clear that it could be avoided in another State, or in any other manner, than by direct proceedings for its reversal in that State: *Hendrick* v. *Whittemore*, 105 Mass. 23; *Henderson* v. *Staniford*, Id. 504."

"Even voidable by A." What does this mean? Surely, it must mean that, supposing the presumption that B. was a citizen of California were shown to be erroneous, supposing, then, that there was no jurisdiction acquired as to him, yet the judgment which the Massachusetts court might then have to hold *void as to him*, it would hold *not even voidable as to A.*, who had acquiesced in it, and had taken no "direct proceedings for its reversal in that State." In other words, the Massachusetts court seems to have insensibly come to the doctrine that a judgment which may be held to be void as to the unsummoned, the non-resident defendant, over whom jurisdiction was never acquired, may as to the summoned defendant, who has acquiesced in it, be only voidable, that is to say, practically *valid*. The contrary doctrine, as applied by the Massachusetts court, leads to this inconsistency, that the plaintiff cannot recover when, having obtained an irregular judgment in another State, he brings in Massachusetts an action of debt on judgment against the summoned defendant, because his judgment is *voidable*, that is to say, *void there*, nor can he recover if he sues the summoned defendant in Massachusetts on the original cause of action, because his judgment is *only voidable, i. e., valid, where rendered*, and has merged the original cause of action (*Hendrick* v. *Whittemore, supra*, *Henderson* v. *Staniford, supra*) and therefore he is to be left *without any remedy either way*.

Having seen how the latest decisions in Massachusetts[1] have, to a certain extent, modified the doctrine of *Hall* v. *Williams*, and having noticed incidentally that a pretty strong argument *ab inconvenienti* stands in the way of its acceptance, unless it be in itself sound and

[1] *Wright* v. *Andrews*, 130 Mass. 149, which follows *Hall* v. *Williams*, was not reported when this article was written.

well established, let us examine the basis of legal reasoning or of authority on which the doctrine is supposed to rest.

Now it is perfectly apparent that in reaching the conclusion that a judgment like the one sued on in *Hall* v. *Williams*, 6 Pickering, is void as to both defendants, the courts travel along two different lines of argument, that is to say, they begin with the first-principles-of-justice argument, and then suddenly abandon that for another, which, whether it be sound or not, is based upon merely technical considerations. "It is contrary to the first principles of justice that judgment should be rendered against an unsummoned defendant (not a citizen), or against two or more unsummoned defendants (not citizens);"—perfectly true; but if judgment has been rendered against A. who was, and B. who was not, summoned, and in another State suit is brought on this judgment, it is plain that, although this argument may help B., it has nothing to do with A.'s case, and then the courts suddenly plant themselves upon the technicality, "void as to one, void as to all."

The whole argument is based at last upon this supposed technical rule, which has been repeated as if it were a self-evident legal truth, needing neither reason nor authority to sustain it, and the whole argument must fall if we find that by the weight of authorities a judgment—that mysterious "entirety"—may be avoided as to one, and *yet allowed to stand as to the other*,—not, be it observed, on a writ of error, or on an appeal from the joint judgment, for so far as concerns these, "void as to one, void as to all," is a correct statement of the law, but on motion to vacate or set aside the judgment, addressed to the court which rendered it.

II. The law as laid down in Motteux *v.* St. Aubin.

We have seen that the proposition relied upon as the foundation for *Hall* v. *Williams*, is that a judgment against A. and B. is an *entirety;* if void as to B., it is necessarily void as to A.; and the *corollary* deduced from it is that when judgment has been rendered in one State against A. and B. of whom A. was, and B. was not, summoned, an action of debt on this judgment cannot be brought in another State against A. We think, however (1st), that the weight of authority is in favor of the *contrary proposition*, viz.: that a judgment against A. and B. is not necessarily an entirety, that it may be avoided as to one—or held to have been void *ab initio* as to one—and *yet allowed to stand as to the other*, and (2dly) that from the proposition, must follow this *corollary*—which is besides supported by

direct decisions—that against the summoned defendant (in such a judgment as has been mentioned) an action of debt on judgment may be brought in another State.

The leading case on the subject is *Motteux* v. *St. Aubin*, 2 W. Black. 1133, decided in 1777. The case is as follows: Davy moved to set aside the judgment against Sir John St. Aubin only, and to strike his name out of the warrant of attorney to confess this judgment, which was entered against Sir John and one William Davis, his surety; it being proved by the affidavits of his mother and relations, that Sir John is now only eighteen years old, and that this judgment was obtained from him by advancing him money (how usuriously did not appear) in order to supply his extravagance at Westminster school. Walker showed for cause, that by Style 121, 125, judgment against an infant (who appeared by attorney) and two others, could not be reversed against the infant *only*, but must be against all or none.

GOULD, Justice.—I have no doubt. This is not a reversal of the judgment by writ of error, but the vacating the warrant of attorney, as against the infant, for imposition; after which the judgment drops of course. I remember Lord HARDWICKE, in the King's Bench, held that relief might be given upon warrants of attorney if unduly obtained, and the courts have always followed that opinion. I say nothing as to Davis [the other defendant], the procurer of this money. Let him shift for himself.

BLACKSTONE and NARES, JJ., concurred.

This case was relied on and followed in *Ashlin* v. *Langton*, 4 Moore & Scott, 719. It was also relied on and followed, at an early day, by the Court of Common Pleas of Philadelphia, and by the Supreme Courts of New York and New Jersey, and the law has been similarly declared in many other States.

The Philadelphia case, *Gerard* v. *Basse*, 1 Dall. 119, decided in 1784, was as follows: A judgment was entered on a bond and warrant to confess judgment, executed by one partner with one seal, in the name and behalf of both. On motion, the judgment was set aside as to the partner who did not sign, but held valid as to the other.

The president delivered the unanimous opinion of the court: "* * * The law in 2d Blackstone 1133 has set us the example; we there see the judges, on an application of this sort, set aside a warrant of attorney as to one, and let the other shift for himself. We may with equal reason set aside the judgment as to the man who gave no authority for entering it, and let the other, who did really execute it, shift for himself. We are disposed to go further, if it shall be

asked of us. We see no reason why, in this case, we may not give leave to the plaintiff to strike the name of Basse out of the proceedings, as a mere nullity. * * * Accordingly, judgment set aside as to Basse, and confirmed as to Soyer."

The leading case in New York on this subject, *Green* v. *Beals*, 2 Caines, 254, decided in 1804, quotes and fully sustains *Motteux* v. *St. Aubin*, and it is in turn relied upon and followed in *Crane* v. *French*, 1 Wend. 311, *St. John* v. *Holmes*, 20 Wend. 609, and *Brittin* v. *Wilder*, 6 Hill, 242, which also cites with approval *Gerard* v. *Basse*, *supra*. Not only has the main proposition which we are considering, been thus established in New York, but the *corollary* which (as we have suggested) is deducible from it, has also been established by a direct decision, *Reed* v. *Pratt*, 2 Hill. 64 (1841). Action of debt in New York, against five, on an Ohio judgment against five in a case where P. and T. had authorized attorneys to appear (and the attorneys did appear) for all five. Of the five defendants sued in New York, only P. and T. interposed any plea, and their demurrer to the replication admitted that they employed the attorney to appear for all five. Judgment against P. and T. The opinion of the majority of the court was delivered by Cowen, J., who does not refer to *Hall* v. *Williams*; but the "first principles" of justice which weighed with him are very different from those which we encountered in that case. "And now they alone set up the want of authority. * * To allow *them* [italics in the text] to plead as they have done, would be to legalize the grossest iniquity."

The New Jersey case, *Silvers* v. *Reynolds*, 2 Harrison 275 (1839) is direct and emphatic. A judgment against two persons, by confession or warrant of attorney, may be set aside as to one of them (it appearing by affidavits that nothing is due and owing from him to the plaintiff), and stand good as to the other. "If the present case was before us on a writ of error, I do not say that we could reverse the judgment as to one defendant and affirm it as to the other; but courts of law have immemorially exercised an equitable power over judgments entered by their authority on warrants of attorney, by confession. * * Let a rule be entered, to strike the name of Brittin out of the record, so that it may remain a judgment against Silvers only."

Quære: How should be classified the later case of *Mackay* v. *Gordon*, 34 N. J. 286, where *Hall* v. *Williams* and *Reed* v. *Pratt* are cited on the same point and with *equal approval?* There is a misprint at the end of the report, where judgment "for the plaintiffs" should be "for the defendants."

Another emphatic decision is *Douglass's Lessee* v. *Massie*, 16 Ohio 271 (1847). In 1832, Riddle and another, plaintiffs in an action for a breach of covenant of warranty, brought suit in the Court of Common Pleas of Ross county, Ohio, against five parties, heirs of one Massie, who had died intestate in 1813, and although only two of them were summoned, recovered judgment against all five, for $1625 damages and costs, to be recovered from any assets which had come to defendants by descent from their ancestor. In 1833 execution and levy was made upon land which had so descended, and under such proceedings it was sold to the lessor of the plaintiff. When he brought ejectment in the Supreme Court in Ross county to recover the land, a nonsuit was ordered by the court; the plaintiff moved to set aside the nonsuit, and on this motion the case came before the Supreme Court of the state.

"Two objections are made to the plaintiff's right to recover in this ejectment: First. That the judgment before the Common Pleas * * * is void. * * * It is claimed that the judgment is void, because, upon part of the defendants named in the original suit, no service was ever made. Now, it is conceded that if there had been no service upon either of the defendants, * * * the court would have had no jurisdiction, * * * the judgment would have been a nullity, and all proceedings under it void. Such a judgment, execution under it, and sale, would not have passed any title, and would not be treated as evidence in an action of ejectment. But that is not the present case. Two of the defendants were summoned, and * * * over [them] the court had jurisdiction. Could the judgment be pronounced *void*, because, with some who were liable, others not liable were joined? That the judgment would be erroneous is certain, and we have had frequent occasion, upon writs of error, to reverse such judgments. The judgment, too, because it is joint, would be reversed as to all the defendants. * * * Though this judgment is erroneous, upon principle, it cannot be collaterally impeached. * * * Considering the judgment erroneous and therefore voidable, but not void, the court decide that an execution could have been lawfully issued, and lands by virtue of it, subjected to sale. The nonsuit was set aside. This case is affirmed and followed in *Newburg* v. *Munshower*, 29 Ohio St. 617.

A recent case to be noticed is *Harvey* v. *Drew*, 82 Ill. 606. Suit was brought in the Supreme Court of New York against A, B, and others, of whom B was not within the jurisdiction nor subject to the laws of New York, and judgment was obtained for the whole amount. The judgment was subsequently compromised by A for an

amount less than what was justly due, and he sued B, in Illinois, for contribution. The court held, as the Massachusetts court had held in *Hendrick* v. *Whittemore, supra*, that the defendant was liable to contribution on general principles, and whatever might have been the defects of the judgment, but it also held, herein departing from the doctrine of *Hall* v. *Williams*, that although the New York judgment would not have been good to sue B on in Illinois, "*no doubt it was a valid judgment against* [*A*]." p. 608.

There are many cases in the English reports of actions on foreign or colonial judgments, but none where the judgment had been rendered against two defendants, one of whom had not been summoned, and we can only suppose that when such a case comes up the doctrine of *Motteux* v. *St. Aubin* will be applied to it. In Canada, however, the point was decided in *Bacon* v. *McBean*, 3 U. C. Q. B. 305 (1847). Suit brought on a judgment which had been rendered in New York against A and B. Plea that B had not been summoned. The Court decided, per Robinson, C. J.: "The plea sets up as a defence for the defendants a matter which only concerns one of them," and gave judgment for the plaintiff.

For other decisions which follow the doctrine of *Motteux* vs. *St. Aubin*, see Mr. Freeman's note at page 604 of volume 32 of his American Decisions series (1882).

There are two recent cases which hold, contrary to the doctrine of *Motteux* v. *St. Aubin*, that a judgment cannot be vacated as to one defendant and allowed to stand as to the other: *Van Rensselaer* v. *Whiting*, 12 Mich. 449, decided by a majority of the court, and *Johnson* v. *Lough*, 22 Minn. 203. In neither case are any authorities cited bearing upon the point, nor do these cases seem to have been relied upon elsewhere to sustain the *Hall* v. *Williams* doctrine.

The point involved in *Motteux* v. *St. Aubin*, was touched upon, but not strictly speaking decided, in a recent case: *Shuford* v. *Cain*, 1 Abbott (U. S.) 302. This case came before the judge of the District Court for the northern district of Georgia—a court which has circuit court powers—and was decided on motion to vacate a judgment which had been rendered in that court against two defendants. Both of them had been summoned, but, for reasons which it would take too long to set forth here, the judgment was erroneous as to both. Counsel for the plaintiff contending that even if the judgment, so far as it affected A, was void, it must nevertheless stand good as against B, the court, in the course of the opinion, used the well-worn phrase: "This judgment being an entirety, if void in part, is void in all; if annulled as to one of the parties, it must be annulled as to

both" (p. 310), but did not cite *Molteux* v. *St. Aubin*, or any other of the few authorities on the effect of judgments against joint defendants, *motion being made to set aside*. Moreover, as the court had already shown (pp. 306–308) that the United States Court had *no jurisdiction* either as to A. and B. jointly, or as to A. alone, and that as against B., the plaintiff had, in the actual state of the pleadings, no standing at all, and as the court had declared (p. 309), "that the rendition of the judgment was *coram non judice*, and therefore utterly void," it is plain that the expression quoted in the last sentence is merely *obiter*.

But the courts have gone much further than merely to hold that judgment by confession *may be set aside*, at the instance and for the benefit of the defendant, who did not authorize it to be entered up, and may be allowed to stand as to the other. They have held such judgments to be simply *void as to one, valid as to the other*. When one member of a copartnership has confessed judgment for the firm, it has been repeatedly held that the judgment, though void as to the other partners, is valid as to the partner procuring it to be entered: *Crane* v. *French*, 1 Wend. 311; *The York Bank's Appeal*, 36 Penn. St. 458;[1] and if the creditor, treating the irregularly obtained judgment as void, sues on the original demand, he is told that such judgment, *valid in part*, has merged the original cause of action: *North* v. *Mudge*, 13 Iowa, 496.

The well considered case of *Chapin* v. *Thompson*, 20 Cal. 681, is incorrectly quoted in Freeman on Judgments, at §557, the author being probably misled by the head note. "In California such a judgment [one entered under a statement purporting to authorize the entry of judgment against several, but which is signed by less than the whole number of the defendants] is treated as an entirety, and being invalid as to one defendant, is invalid as to all." This reads much like *Hall* v. *Williams*, but it is not what the court decided. The court, after deciding, ~~as we have seen,~~ that the judgment could be set aside because it was not signed by the judge, also held that "the warrant of attorney" under which the judgment was entered was "ineffectual for any purpose. A fatal objection to it is, that it

[1] This doctrine derives some support from *Hall* v. *Lanning*, 91 U. S. 160, for although it is not directly laid down there, it is strongly implied from the language used by the court in the first and last sentences of the decision. "The question to be decided * * is * * whether a judgment against all the partners, founded on such an appearance, can be questioned *by those not served* with process in a suit brought thereon in another State." "The defendant [B] had a right, for the purpose of invalidating the judgment *as to him*, to prove," &c. The italics are our own.

was signed by two of the defendants only—the signatures of the other defendants being attached without their consent. Of course, as to the latter, it [*the warrant of attorney*] was a mere nullity, and as no judgment could be entered upon it against them, it was equally ineffectual as to the former. * * * The warrant was the measure of its authority, and any judgment other than that expressly authorized, would have been *coram non judice*. * * The rule in such cases is that the authority must be strictly pursued, and this rule has been repeatedly laid down." The court cites *Gee* v. *Lane*, 15 East 592, and other cases. The distinction between *Crane* v. *French*, *supra*, and the case in East, is sufficiently obvious. In the first, A., without authority, gives a warrant of attorney to confess judgment against A. and B., and judgment is entered accordingly; held valid as to A., void as to B. In the second, A. and B. give a warrant of attorney to confess judgment *against them both*, and it is entered, contrary to the terms of the authority, against A.; held void.

The question of validity *as to one but not as to all* may also arise thus: what if a defendant, one of two, *dies* before judgment is rendered? does this make a judgment rendered mistakenly against both, void also as to the other? See Chancellor Cooper's decision in *Collins* v. *Knight*, 3 Tenn. Ch. 183,[1] that although a judgment or decree taken against a person then dead, jointly with others, may be void as to the dead man, it would *prima facie* be good as to the other defendants.

Once admit—and under the authorities cited it is hard to deny—that in spite of the supposed technical difficulty, a judgment is not so entire but that it may be valid as to one defendant while void as to another, or that it may stand good as to one defendant though struck out as to another, and it is not easy to see how the decision in *Hall* v. *Williams*, 6 Pickering, can be sustained, for the "first principles of justice" have nothing to do with the case of the summoned defendant, and the "full faith and credit" clause of the Constitution settles it that if the judgment is good where rendered, it is just as good in any other State.

A question of pleading, of vital importance and not easy to decide, must now be briefly considered. When judgment has been rendered jointly against A. who was summoned and B. who was not, and suit is afterwards in another State brought against A. on the judgment, if the plaintiff were to declare as on a *separate* judgment, the defendant

[1] Cited in Mr. Freeman's note in 32 American Decisions, mentioned above.

would argue that however defective was the judgment against B., it was still *on the face of it*, a joint judgment, and that the plaintiff must be put out of court on the plea of *nul tiel record*. What if the bewildered plaintiff takes the other course, and declares as on a *joint judgment?* There is not wanting authority for the position that in this case too he must be put out of court on the same plea, for now A. takes the ground that the judgment which (as he proceeds to argue) was not only voidable but void as to B. *is not and never was a joint judgment: Smith* v. *Smith*, 17 Ill. 482. And as the plaintiff would be told, if he attempted to sue A. on the original cause of action, that that is merged by the judgment, which, at least as against A. *is valid where rendered*, he might as well have no right to sue at all, for it is plain he can never recover. The Illinois court say, in *Smith* v. *Smith*, *supra*: "[A.] is certainly estopped to deny that the judgment is valid and binding upon him, * * he may deny that it is a judgment against him and [B.] * * If the record would not answer a plea of *nul tiel record* interposed by [B.], it could not when interposed by [A.]." But can the defendant blow hot and cold in this way? If he is to prevail by such legal hocus-pocus, it has been a waste of time to discuss at all the question of validity or invalidity, it has been a useless exercise of ingenuity for the courts to discriminate between the position of the summoned and of the unsummoned defendant, it has been quite futile for them to insist (as the Illinois court emphatically did in the very case of *Smith* v. *Smith*) that the judgment is valid as against the summoned defendant. There ought to be some way out of the difficulty.[1] We suggest two possible solutions, without pretending to say which is the more reasonable, but through one or the other—perhaps through either, as he chooses—the plaintiff should be allowed to obtain his remedy. That is to say, either, First, by declaring as on a judgment rendered against A. and B. under *such or such circumstances*, setting forth fully the facts, and the inference of the law that because B. was not summoned it is

[1] When suit on judgment is brought against an unsummoned defendant *for whom an attorney, though without authority, had appeared*, he must make his defence, not under the plea of *nul tiel record*, but by special plea, because *such* a judgment is good on the face of it: *Bowler* v. *Huston*, 30 Grat. 266; *Hill* v. *Mendenhall*, 21 Wall. 453, and if the plaintiff were to sue the co-defendant (summoned or authorizing the appearance) declaring as on a joint judgment, still less could this defendant escape on the plea of *nul tiel record*, nor is it to be supposed that a special plea would be allowed to avail him. But the authorities quoted throw no light on the question how the plaintiff is to declare against A. when *not even an unauthorized appearance* had been entered for B.

in fact only a binding judgment against A., and such a declaration should be held good either on demurrer or against the plea of *nul tiel record;* or else, Secondly, by declaring as on a joint judgment, on the theory that the court must hold (contrary to *Smith* v. *Smith*) that when A. is sued, *he* may *not* deny that the record shows a joint judgment against him and B. We submit that the court should then reason it out thus: "Admitting that the judgment was most irregular, admitting that as against B., it is entitled to no respect in the State where it was rendered or anywhere else, admitting that any court of any State would *in B.'s favor* declare it to be *void as against him*, nevertheless the judgment *has not yet been declared void*, and this is not the proper occasion so to declare it: for the purposes of this action *against A.*, it *is* a joint judgment and *A.* is estopped to deny it."[1]

Whether one or the other of these methods of declaring be adopted, the rule of pleading that the proof must correspond with the allegations, is still complied with. For if, first, the plaintiff declares on a judgment which, *under the special circumstances which he sets forth*, only amounts to a separate judgment against A., he proves those special circumstances accordingly, and if, secondly, he declares as on a joint judgment against A. and B., the record sustains him by showing *on the face of it* a joint judgment, and the court rejects A.'s offer to point out any irregularities *as to B.*, which might make it other than a joint judgment.

[1] That judgments should not lightly be pronounced *void*, was forcibly insisted on by the Supreme Court of New Jersey in *Dean ex dem. Inskeep* v. *Leeony*, 1 Coxe, 111, decided in 1791, and many decisions, doubtless, could be cited to the same effect.

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ADDITIONAL AUTHORITIES.

The following additional authorities are cited (with permission of the Court) by counsel for Plaintiffs in Error.

Pennsylvania Authorities.

Troubat and Haly's Practice, Vol. I, Part 2, p. 646: "Irregularities that will enable parties to set judgments aside on motion, do not vitiate them utterly, and until they are reversed or set aside by legal proceedings they are binding and conclusive."

Lewis v. *Smith*, 2 S. & R. 142.
A judgment erroneously entered is valid until reversed.

Boaz v. *Heister*, 6 S. & R. 18.
Judgment against two, of whom one was not summoned, reversed on appeal.
"I say nothing whether if execution had issued only against the one who had been arrested, the court below would have set it aside for irregularity; that is another question."

Benton v. *Burgot*, 10 S. & R. 240.
"Whatever opinion might be entertained by different courts as to enquiring into the fairness of a judgment rendered in the court of one State, in an action on that judgment brought in another State, the opinion never has been entertained that there can be an enquiry into the mistakes of the court which gave the judgment, provided the defendant was notified and the court had jurisdiction."

Drexel's Appeal, 6 Pa. St. 272.

An actual, but irregular judgment entered on the records of a court without authority, can only be reversed on writ of error, or set aside in the court below, on motion.

Jamieson v. *Pomeroy*, 9 Pa. St. 230.

Where a judgment is entered generally, and one of the parties was not served, this court will reverse as to him, and affirm as to the others, under the Act of 1836. "Two of the defendants cannot complain, because they have had the benefit of a fair trial. The other cannot, because he is released from the judgment."

Reber v. *Wright*, 68 Pa. St. 471.

"Where the court of a sister State has jurisdiction, its judgments are final and conclusive in the courts of every other State."

Kneib v. *Graves*, 72 Pa. St. 104.

Judgment entered against a firm on a note with warrant of attorney to confess judgment, not under seal, signed by one of a firm, in the firm name, for a firm debt. *Held*, that the plaintiff was entitled to execution against the firm effects, but not against the other members of the firm.

Burnell v. *Brady*, 2 Weekly Notes of Cases, 370.

Judgment against two, one of whom had died before commencement of action. "The judgment as to C. is set aside, and also the levy and *fi. fa.* so far as regards the said C. The judgment, levy and *fi. fa.* to stand as to the other defendant."

Hartman v. *Hesserich*, 8 W. N. C. 483.

The court will not strike off a judgment entered against several defendants on a warrant of attorney, though one of them *died* before the entry of the judgment and the survivors were his sureties.

(See also *Warder* v. *Tainter*, 4 Watts 270.

A judgment in *scire facias* upon a mortgage is not void, although the defendant was dead when the first writ issued. This case approved in *Carr* v. *Townsend's Executors*, 63 Pa. St. 202.)

York Bank's Appeal, 36 Pa. St. 458, is mentioned at page 14 of the Law Register article (submitted with brief), and *Donnelly* v. *Graham*, 77 Pa. St. 274, at page 4.

Also the following

DECISIONS IN OTHER STATES

not referred to in brief of plaintiff in error:

Bruce v. *Cloutman*, 45 N. H. 37.

Plaintiff cannot recover (in debt on judgment) if upon production of the record the judgment upon its face appears to be void, but he may recover if the judgment, though erroneous, is merely voidable, and has not been set aside or reversed.

Especially relied on is *Gray* v. *Stuart*, 33 Gratt. 351 (1880).

Judgment against three held void as against the unsummoned defendant and good as against the other two.

"The judgment against G. was a valid judgment. He was served with process, and a judgment was regularly obtained against him as one of the endorsers. . . . . There was no writ of error to that judgment, and it stands unreversed to this day, and is a subsisting lien upon his real estate. . . . .

"It is urged that the judgment being joint against all, and the judgment against P. being declared void, that therefore the judgment against H. and G. is also invalid. . . . .

"The defendant P. never having had notice, the judgment against him is no judgment at all, and he must be regarded as out of the case, and the joint judgment against him, H. and G. must be regarded as only a judgment against G. and H."

As directly in point and especially relied on are:

Valentine v. *Cooley*, Meigs 613 (1838).

Winchester v. *Beardin*, 10 Humph. 247 (1849).

Bailey v. *McGinniss*, 57 Mo. 362 (1874).

Mercer v. *James*, 6 Neb. 406 (1877).

All cited in Mr. Freeman's note.

Also the following recent Missouri cases, directly in point, not cited by Mr. Freeman:

Lenox v. *Clarke*, 52 Mo. 115 (1873).

Holton v. *Towner*, 81 Mo. 360 (1884).

This last is believed to be the *latest case* on the subject; and in spite of counsel's reliance upon Freeman on Judgments, sec. 136, and contention that the judgment was an entirety and void as to all, the court decided that:

A judgment rendered jointly against a married woman and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman it is a nullity, and although it is also an entirety for the purposes of review on appeal or writ of error, and would be reversed as to all the defendants if thus directly assailed.

Blake v. *Burley*, 9 Iowa 592, is an authority that one of two defendants in a judgment recovered (a normal and regular judgment) may be sued alone. [This only bears upon the point raised in the *first* count of the declaration.]

Bank of U. S. v. *Merchants Bank*, 7 Gill 415, shows that in Maryland the plaintiff could not have sued on his original cause of action, which was merged by the judgment.

Poe's Pleading, I, sec. 284, that under the Maryland system of pleading, a count on the original cause of action (covenant) and a count in debt (on the judgment) could not have been joined.

Respectfully submitted by

FREDERICK J. BROWN,
Counsel for Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 229.

MICHAEL HANLEY AND WILLIAM F. WELCH,
PLAINTIFFS IN ERROR,

vs.

CHARLES DONOGHUE, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF MARYLAND.

BRIEF OF

EDWARD C. EICHELBERGER,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 229.

MICHAEL HANLEY AND WILLIAM F. WELCH,
PLAINTIFFS IN ERROR,

vs.

CHARLES DONOGHUE, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF MARYLAND.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error submits that the judgment of the Court of Appeals of Maryland should be affirmed, for the following reasons:

1st. The declaration set forth on pages 1, 2, 3 and 4 of the record, shows that the action was brought upon a foreign judgment rendered by the Court of Common Pleas of Washington County, in the State of Pennsylvania, in June 1877, against Charles and John Donoghue, in a suit upon a joint contract; that Charles was regularly summoned but that no process was issued against John, who was not within the jurisdiction of said Court, either at the time when said suit was instituted, or when said judgment was rendered, and did not

appear in said suit, either in person or by attorney; yet, notwithstanding the above facts, the said Court of Common Pleas of Washington County, Pennsylvania, did undertake to render, and did in fact render judgment jointly, against both the said John Donoghue as well as the said Charles Donoghue, which the defendant submits was illegal and void. That the jurisdiction of the Court over the person or thing against whom or which its judgment or decree is pronounced, is a prerequisite to the validity of any such judgment or decree; and that the judgment of the said Court of Common Pleas of Washington County, Pennsylvania, rendered against the said John Donoghue, upon a joint obligation of the said John and Charles Donoghue, was utterly null and void, because said Court did not possess jurisdiction over the said John Donoghue, the prerequisite to enable it to render a valid judgment against him.

D'Arcy vs. Ketchum, 11 Howard, 165, 174, 176.
Thompson vs. Whitman, 18 Wall. 457.
Pennoyer vs. Neff, 95 U. S. 714, 720, 728, 730-733.
Hall vs. Williams, 6 Pick. 232.
Starbuck vs. Murray, 5 Wendall, 148-158.
Shumway vs. Stillman, 6 Wendall, 452.
Koechlept vs. Hook's lessee, 10 Md. 174, 179.
Weaver vs. Boggs, 38 Md. 261-263.
Gilman vs. Gilman, 126 Mass.
Wright vs. Andrews, 130 Mass. 150.

[For definition of the term "full faith and credit" to be given foreign judgment under Constitution of the United States, see—

D'Arcy vs. Ketchum, 11 Howard, 165, 174.
Thompson vs. Whitman, 18 Wall. 457.
Pennoyer vs. Neff, 95 U. S. 729 to 733
Weaver vs. Boggs, 38 Md. 263.]

And, indeed, it is conceded by the "Nar" filed in this case, that the judgment of said Court of Pennsylvania was null and void as far as John Donoghue was concerned, yet it appears by the third count of the amended declaration that the plaintiffs

have undertaken to correct said judgment and declare upon what, in their opinion, would have been the proper judgment for the Court to have rendered. In other words the plaintiffs have undertaken to correct the errors of a judgment of a Court of Record, not by any proceeding in said Court, or in the appellate tribunal of the State in which said judgment was rendered, but by varying the Record to meet their own views, and accepting so much of said Record as good and so much as bad, and declaring upon a part and not the whole; which, the defendant submits, cannot be done—and that the judgment below, sustaining the demurrer, (as far as the 2d and 3d counts are concerned,) should be affirmed for the—

2d reason, viz: That the judgment as rendered by said Court of Common Pleas of Washington County, Pennsylvania, and as it now stands upon the Records of said Court, and is declared upon in this case, is *an entirety, and if void as to one defendant is void as to all, and if erroneous as to one is erroneous as to all.* It *was a joint judgment* entered *upon a joint obligation*, and as *an entirety, if void as to one*, must be void as to the other also.

2 Saunders, 101.
Hall vs. Williams, 6 Pick. 232.
Wright vs. Andrews, 130 Mass. 150—(decided in 1881, affirming *Hall vs. Williams.*)
Holbrook vs. Murray, 5 Wendall, 161.
Donelly vs. Graham, 77 Pa. St. Rep. 274 to 276.
Shuford vs. Cain, 1 Abb. U. S. Circuit Ct. Rep., 302, 310.
Benner vs. Welt, 45 Maine, 483.
Ruffum us. Ramsdell, 55 Maine, 252.
Covenant Life Ins. Co. vs. Clover, 36 Mo. 392.
Richard vs. Walton, 12 Johns. 434.
Kitchens vs. Hutchins, 44 Geo. 620.
Commercial Bank vs. Wilson, 14 Grant, Ch. 431.
Vorhis vs. Gamble, 6 Mo. Ap. 1.
Van Ranselecar vs. Whiting, 12 Mich. 449.
Jansen vs. Varmine, 89 Ill. 100.
Johnson vs. Lough, 22 Min. 203.

Cole vs. Pennel, 2 Randolph, 174.
Kelly vs. Bandini, 50 Cal. 530.
Freeman on Judgments, sections 43 and 136, 3d Edition.
Rangley vs. Webster, 11 N. H. 290.
Beckley vs. Newcomb, 24 N. H. 359.

Whatever validity the judgment possesses, it acquired by the act of the Court which rendered it, and as the completed act of that Court it can only be modified by the same power that gave it existence, or by the higher exercise of that power by the appellate tribunal of that Court.

2 Saunders, 101.
Hall vs. Williams, 8 Me. 434.
Idem, 10 Me. 278.

In addition to these reasons, the defendant in error submits that the judgment below should be affirmed for the further reason (as far as the first count is concerned,) because said first count sets forth a joint judgment recovered against John and Charles Donoghue. This suit is instituted against one only, viz: Charles Donoghue, being only one of the joint obligors in said judgment—and the non-joinder of the other joint defendant, John Donoghue is unaccounted for by any sufficient averment in the declaration. Both ought to have been sued or some sufficient reason alleged why the other was not joined.

Revised Code of Maryland, Art. 64, Secs. 52, 53 and 56.

Sec. 52. "No person shall institute more than one suit on a joint and several bond, promissory note, penal or single bill, when the persons executing the same are alive and reside in the same county; and if more suits than one be instituted on any such bond, promissory note, penal or single bill, judgment of *non pros.* shall be entered against the plaintiffs in such suits."

Sec. 53. "If a joint obligor be dead when the suit is brought, his representative may be sued."

Sec 56. "If the obligors, in any bond, penal or single bill, reside in different counties, they may be sued in the counties in which they respectively reside, but all residing in the same county shall be sued in one action."

Merrick vs. Bank of Metropolis, 8 Gill, 64.
Kent vs. Holliday, 17 Md. 387.
State vs. Megraw, 12 Gill & J., 265.
Prather vs. Manro, 11 Gill & J., 261.
State vs. Wheeler, 14 Md. 108.
Freeman on Judgments, section 43, 3d edition.

For all of which reasons the defendant in error submits that the judgment below should be affirmed.

EDWARD C. EICHELBERGER,

Counsel for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 349. 80

THE BRIDGEWATER IRON COMPANY, PLAINTIFF IN ERROR,

vs.

HERMAN LISSBERGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 9, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 349.

THE BRIDGEWATER IRON COMPANY, PLAINTIFF IN ERROR,

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1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Herman Lissberger of the city, county, and State of New York, plaintiff, and The Bridgewater Iron Company, a corporation by and under the laws of the commonwealth of Massachusetts, defendants, in an action of tort, a manifest error hath happened, to the great damage of the said defendants as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirty-first day of January, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
JOHN LOWELL, *Circuit J.*

2 CIRCUIT COURT OF THE UNITED STATES, }
District of Massachusetts, } *ss.*:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court, this twenty-seventh day of September, A. D. 1882.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 *Plaintiff's Declaration.*

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss.:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-one.

Before the Honorable John Lowell, circuit judge.

HERMAN LISSBERGER, of the city, county, and State of New York, and a citizen of said State of New York, and of the United States of America, Plaintiff,

v.

4 THE BRIDGEWATER IRON COMPANY, a corporation established by and under the laws of the Commonwealth of Massachusetts, and having its principal place of business in Bridgewater, in Plymouth county, in said Commonwealth, and being a citizen of said Commonwealth, Defendants.

In an action of Tort.

And the plaintiff says that by an instrument in writing executed to the plaintiff on the tenth day of August, in the year eighteen hundred and seventy-seven, George B. Stetson, formerly of Bridgewater, in the county of Plymouth, being then the owner of twenty shares of stock in the Bridgewater Iron Company, a manufacturing corporation duly established under the laws of the Commonwealth of Massachusetts, and of the certificate of the ownership of said shares duly issued by said company to said George B. Stetson,
5 duly transferred and assigned said shares and the certificate thereof to the plaintiff, and thereby the plaintiff became entitled to have said instrument of assignment recorded upon the records of said company, and a new certificate of the ownership of said shares issued to him by said company; that the plaintiff on the fifteenth day of December, in the year eighteen hundred and seventy-eight, duly presented to the Bridgewater Iron Company said instrument of assignment for record by the clerk of said company and tendered to said company, through its treasurer, said certificate issued to said George B. Stetson, and demanded that said company issue to him, the plaintiff, as the owner of said shares, a new certificate of said shares certifying to the plaintiff's ownership thereof according to the provisions of law in that behalf, but said company refused to record said instrument, and refused to issue to the plaintiff such new
6 certificate, and claimed to be itself the owner of said shares, whereby the plaintiff has been prevented from obtaining from said company the title to and property in said shares, and been deprived thereof, and of the certificate thereof, to which he was entitled, and which it was the duty of said company to issue to the plaintiff, and he has been prevented from selling and transferring the same and from recovering the dividends declared on said shares of stock, and has lost the value of said shares of said stock.

Second count. And the plaintiff further says that by an instrument executed to the plaintiff on the fourth day of August, in the year eighteen hundred and seventy-four, George B. Stetson, formerly of Bridgwater, in the county of Plymouth, being then the owner of twenty shares of stock in the Bridgewater Iron Company, a manufacturing corporation, duly established under the laws of the
7 Commonwealth of Massachusetts, and of the certificate of the ownership of said shares, duly issued by said company to said George B. Stetson, duly transferred and assigned said shares and the certificate thereof to the plaintiff, to hold as collateral security for the payment of certain promissory notes given by said George B. Stetson to the plaintiff, and thereafter other notes, made by said Stetson, were given by said Stetson to the plaintiff, for the payment of which it was agreed by and between the plaintiff and said Stetson the plaintiff should hold said twenty shares of stock as collateral security; that on the fourteenth day of December, in the year eighteen hundred and seventy-eight, the plaintiff then holding, and entitled to hold, said twenty shares of stock as collateral security for the payment of promissory notes, made by said George B. Stetson and payable to the plaintiff's order, and by him held, to the amount of $17,737.29, of the amount of which $12,367.02
8 was then unpaid, duly presented to the Bridgewater Iron Company said instrument of assignment for record by the clerk of said company, and tendered to said company, through its treasurer, said certificate issued to said George B. Stetson, and demanded that said company issue to him, the plaintiff, as the holder of said shares, a new certificate of said shares, certifying to the plaintiff's ownership of said shares as such collateral security, according to the provisions of law in that behalf; but said company refused to record said instrument, and refused to issue to the plaintiff such new certificate, and claimed to be itself the owner of said shares free from and unincumbered by any interest therein of the plaintiff, whereby the plaintiff has been prevented from obtaining his title and property in said shares, and of the certificate thereof, which it was the duty of said company to issue to him, and he has been
9 prevented from selling and transferring said shares so held by him, and from receiving the dividends declared on said shares, and has lost the value of said shares as such collateral security, to the damage of the said plaintiff, as he says, the sum of twenty thousand dollars.

The writ in this cause is dated the twenty-second day of March, A. D. 1879, and was duly entered at the May term of this court, A. D. 1879, when and where the parties appeared by their respective attorneys.

On the seventh day of July the following answer was filed:

Defendant's Answer. Filed July 7, 1879.

And now the defendant comes and says in answer to the plaintiff's first count, that it admits that said George B. Stetson was, on the fourth day of August, A. D. eighteen hundred and seventy-four, the

owner of twenty shares in said Bridgewater Iron Company, the defendant, a corporation duly established by law in the
10 Commonwealth of Massachusetts; denies that said George B. Stetson duly assigned said shares and the certificate thereof to the plaintiff, and that thereby the plaintiff became entitled to have said instrument of assignment recorded upon the records of the said defendant and a new certificate of said shares issued to him, the plaintiff, by the defendant, as and when he, the plaintiff, saw fit to ask for and demand the same; admits that the plaintiff on the fifteenth day of December, A. D. eighteen hundred and seventy-eight, presented to the defendant an instrument purporting to be an instrument of assignment of said shares for record by the clerk of the defendant; that the plaintiff then demanded by a written paper, a copy whereof is hereto annexed, marked A, that the defendant issue to the plaintiff a new certificate of said shares certifying to the plaintiff's ownership thereof; that the defendant refused to comply with said demand and to record said pretended assignment
11 and claimed to be the owner of said shares; and defendant denies all the other matters and things alleged in said count not already herein particularly denied or admitted. And defendant alleges that by the consideration of the justices of the superior court of the Commonwealth of Massachusetts, holden at Plymouth, within and for the county of Plymouth, in said commonwealth, on the fourth Monday of October, A. D. eighteen hundred and seventy-eight, it recovered judgment on the eighth day of November of said last-named year against said George B. Stetson for the sum of twenty-three thousand eight hundred and twenty-two dollars and forty-nine cents damages and nineteen dollars and seventy-nine cents costs of suit; that execution duly issued upon said judgment on the eleventh day of said November, and was placed in the hands of a deputy sheriff of said county for service; that said deputy sheriff,
12 under and by virtue of said execution, seized and took upon said execution, on the thirteenth day of said November, the said twety shares of said George B. Stetson in the defendant corporation and other property of said George B. Stetson, and having duly kept and advertised the same according to law, duly sold at public auction thereunder said twenty shares to the defendant for the sum of ten thousand dollars, and said other property seized and taken as aforesaid for five hundred eleven dollars, amounting in all to the sum of ten thousand five hundred & eleven dollars, and took the sum of one hundred & thirteen dollars & seventy-one cents thereof for his fees, and applied the balance in part satisfaction of said judgment and execution, and thereby said twenty shares became the property of said corporation; that all said acts and doings, matters and things in relation to said judgment, execution, levy, and sale took place long before the fifteenth day of December, A. D.
13 eighteen hundred and seventy-eight, when the plaintiff presented his alleged assignment for record, and demanded that a certificate of said twenty shares issue to him, the plaintiff, and long before the defendant knew or had the means of knowledge of any

transfer or assignment by said George B. Stetson to the plaintiff, as alleged in plaintiff's first count.

A.

DEC. 14, 1878.

To NAHUM STETSON, *Clerk of the Bridgewater Iron Co.:*

I, Herman Lissberger, of the city, county, and State of New York, hereby notify you that George B. Stetson, now or formerly of Bridgewater, Massachusetts, by an instrument in writing, under the hand of said George B. Stetson, on the tenth day of August, A. D. 1877, duly assigned and transferred to me twenty shares of the stock in said company, and the certificate (No. 9) of said shares issued to said George B. Stetson, dated August 4th, A. D. 1874, and
14 that I am the proprietor of said shares; and that under said assignment and my agreement with said George B. Stetson, I hold the same as collateral security for the amount due on the following notes made by said George B. Stetson, payable to and held by me, on account of which five thousand three hundred and seventy dollars and twenty-seven cents have been paid. Said notes are dated and on the time and for the amounts following:

Aug.	1, '78.	Note	4	mos.,	due	Dec.	4	$3,114 73
"	20, '78.	"	4	"	"	"	23	1,789 26
Aug.	28, '78.	Note	4	mos.,	due	Dec.	31	1,802 75
Sep.	12, '78.	Note	4	mos.,	due	Jan.	15	2,290 15
"	21, '78.	"	"	"	"	"	24	2,116 16
"	25, '78.	"	"	"	"	"	28	2,116 16
Oct.	1, '78.	"	"	"	"	Feb'y	4	2,389 16
Nov.	7, '78.	"	"	"	"	M'ch	10	2,118 92

And I hereby demand of you that said assignment, hereby offered to you for record, be recorded on the records of said company, and that a new certificate of said shares be issued to me and in my name, the said certificate dated August 4, 1877, being hereby
15 tendered to you.

H. LISSBERGER,
By his attorney, DARWIN E. WARE.

To the second count: That it admits that said George B. Stetson was, on the fourth day of August, A. D. eighteen hundred and seventy-four, the owner of twenty shares in the Bridgewater Iron Company, the defendant corporation, duly established by law in the Commonwealth of Massachusetts; denies that said Stetson duly assigned and transferred said shares to the plaintiff as collateral security for any debts or notes of said Stetson to the plaintiff, and that the said plaintiff held, or was entitled to hold, said twenty shares as collateral security for any debt or notes due from said Stetson to the plaintiff on the fourteenth day of December, A. D. eighteen hundred and seventy-eight; admits that the plaintiff, on the the said last-mentioned day, presented to the defendant an instru-

ment purporting to be an instrument of assignment of said
16 shares, for record by the clerk of the defendant; that the plaintiff demanded that the defendant issue to him a new certificate of said shares, certifying to his ownership of said shares as collateral; that the defendant refused to comply with said demand, and to record said instrument, and claimed to be the unincumbered owner of said twenty shares; and defendant denies all other matters and things in said second count not herein already particularly answered to. And defendant alleges that by the consideration of the justices of the superior court of the Commonwealth of Massachusetts, holden at Plymouth, within and for the county of Plymouth, in said Commonwealth, on the fourth Monday of October, A. D. eighteen hundred and seventy-eight, it recovered judgment on the eighth day of November of last-named year against said George B. Stetson for the sum of twenty-three thousand eight hundred twenty-two dollars and forty-nine cents damages, and nineteen dollars seventy-nine cents costs of suit; that execution duly
17 issued upon said judgment on the eleventh day of said November, and was placed in the hands of a deputy sheriff of said county for service; that said deputy sheriff, under and by virtue of said execution, seized and took upon said execution, on the thirteenth day of said November, the said twenty shares of said George B. Stetson in the defendant corporation and other property of said George B. Stetson, and having duly kept and advertised the same, according to law, duly sold at public auction thereunder said twenty shares to the defendant for the sum of ten thousand dollars, and said other property, seized and taken as aforesaid, for five hundred eleven dollars, amounting in all to the sum of ten thousand five hundred & eleven dollars, and took the sum of one hundred & thirteen dollars seventy-one cents thereof for his fees, and applied the balance in part satisfaction of said judgment and execution, and thereby said twenty shares became the property of said cor-
18 poration; that all said acts and doings, matters and things in relation to said judgment and execution, levy and sale, took place long before the fourteenth day of December, A. D. eighteen hundred and seventy-eight, when the plaintiff presented his alleged assignment for record, and demanded that a certificate of said twenty shares issue to him, the plaintiff, and long before the defendant knew, or had the means of knowledge, of any transfer or assignment by said George B. Stetson to the plaintiff as alleged in plaintiff's first count.

This cause was thence continued to the October term of this court, A. D. 1879, when, on the second day of January, A. D. 1880, the following amendment to answer was filed:

Amendment to Answer. Filed Jan. 2, 1880.

And now the defendant amends its answer by inserting in each count after the words "And defendant alleges that," and before the words "by the consideration of the justices of the superior
19 court of the Commonwealth of Massachusetts," the words "on the twenty-eight day of May, A. D. eighteen hundred and

seventy-eight, on a suit brought by it against said George B. Stetson, returnable to the superior court of the Commonwealth of Massachusetts, to be holden at Plymouth, in said Commonwealth, on the fourth Monday of October then next, it caused to be attached on the writ in said suit twenty shares of the capital stock of the said Bridgewater Iron Company, and the same were duly and legally attached by a deputy sheriff of said county, on said suit on said day; that said writ was afterwards duly entered in said court at the October term thereof, and that the defendant corporation duly carried on said suit and."

And by inserting in each count, after the words "seized and took upon said execution, on the thirteenth day of said November, the said twenty shares of the said George B. Stetson, in the defendant corporation," the words "being the same shares attached on the said original suit."

20 This cause was thence continued to the May term of this court, A. D. 1880, when on the ninth day of June, the following amendment to answer was filed:

Amendment to Defendants' Answer. Filed June 9, 1880.

And now the defendant prays leave of court to amend his answer by inserting in each count, after the words "And defendant alleges," on second and sixth pages, the words "that on or before the twenty-eighth day of May, anno Domini eighteen hundred and seventy-eight, a writ was issued out of the superior court for the county of Plymouth, in favor of this corporation against said George B. Stetson, and that on said day an attachment was duly made upon said shares as the property of said George B. Stetson, and thereby said shares were held as security to satisfy such judgment as should be recovered by this corporation in such action and."

Also, by adding after the words in each count, the words
21 "seized upon said execution, on the thirteenth day of said November, the said twenty shares of said George B. Stetson, in the defendant corporation," the words "so attached and held as aforesaid."

This cause was thence continued to the October term of this court, A. D. 1880, when issue having been joined as aforesaid, the Honorable Daniel Clark, district judge of the United States for the district of New Hampshire, duly assigned by the Honorable John Lowell, circuit judge, to hold said circuit court, sitting and holding said court, the same, after a full hearing, was committed to a jury, sworn according to law to try the issue, who after hearing all matters and things concerning the same, returned their verdict therein, and upon oath, said:

The jury find for the plaintiff and assess damages in the sum of twelve thousand and two hundred ninety five dollars and eighty-seven cents ($12,295.87).

On the fifteenth day of January, 1881, the following motion for new trial was filed:

22 *Motion for New Trial. Filed Jan.* 15, 1881.

And now the defendant in said case, after verdict, but before any judgment has been rendered thereon, and not waiving its right of exception, comes and moves that the said verdict may be set aside and a new trial granted—

1. Because said verdict is against the evidence and the weight of the evidence given at the trial of said cause.

2. Because his honor, the presiding judge, permitted the plaintiff to give in evidence the answers to the interrogatories filed in said case of one Nahum Stetson, who was treasurer, clerk, and business agent of defendant corporation, and which are referred to hereby as competent to prove that defendant corporation had such notice of the transfer of certain shares of its capital stock as would defeat its attachment thereof as against the plaintiff. The answers particularly referred to are the 24th and 34th, and the answers to the additional interrogatories to said Stetson.

23 3. Because his honor, who presided at said trial, ruled that if said Nahum received such information as ought to have put him upon an enquiry prior to causing the attachment of said shares in behalf of said company, said attachment and all subsequent proceedings under it were void as to the plaintiff.

This cause was thence continued from term to term to this present term, when, on the third day of January, A. D. 1882, the said motion is overruled by the court. It is thereupon, to wit, January 4, 1882, considered by the court that Herman Lissberger, plaintiff, recover of the Bridgewater Iron Company, defendant, the sum of thirteen thousand and fifteen dollars and seventeen cents ($13,015.17) damages, and his costs of suit, taxed at one hundred and thirty-eight dollars and sixty-seven cents ($138.67).

Upon the trial of the said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury,

24 the said Bridgewater Iron Company, defendants, filed their bill of exceptions, which was duly allowed by the Honorable Daniel Clark, judge of the United States — for the district of New Hampshire, duly assigned to hold said circuit court as aforesaid, and is in the words and figures following:

Bill of Exceptions.

This was an action of tort for not issuing and delivering to the plaintiff a certificate of twenty shares of the stock of the defendant corporation, which was duly demanded on the fifteenth day of December, eighteen hundred and seventy-eight.

The pleadings are made part of this bill of exceptions.

The plaintiff introduced testimony tending to show that one George B. Stetson, on the tenth day of August, eighteen hundred and seventy-seven, was the owner of and held a certificate for twenty shares of the stock of the defendant corporation, which was duly incorporated under the laws of Massachusetts as a manufactur-

25 ing corporation, and that he was president thereof, and that in the year 1874, said corporation became subject to the same

liabilities and provisions of law as if said corporation had been organized under the provisions of the 224th chapter of the Acts of the year 1870.

That on said tenth day of August the said Stetson made an assignment or transfer in writing of said shares to the plaintiff absolute in form, but intended as collateral security for the notes of said George B. Stetson to the plaintiff, and annexed said transfer to said certificate and delivered the same to the plaintiff in the city of New York, in execution of a written contract of the same date as said transfer for the sale of a lot of copper made in New York city by the plaintiff to the said George B. Stetson, which contract provided that said shares should be transferred to the plaintiff as security for the payment of the notes of said George B. Stetson to the plaintiff given for the price of said copper, and the said copper was delivered by the plaintiff to said George B. Stetson, and the notes
26 delivered to the plaintiff, according to said contract of sale. Copies of said contract, transfer, and certificate are made part of this bill and annexed hereto, marked "A," "B," & "C."

And the plaintiff introduced evidence tending to show the market value of said stock at the date of said demand. The plaintiff offered no evidence, except as hereinafter stated, that he gave notice of said transfer to the clerk or treasurer of the corporation, or that he gave the transfer to the clerk to be recorded, or produced the same, or the said certificate to the treasurer, or applied for a new certificate of said stock to be issued to himself until the said fifteenth day of December, 1878, when the corporation refused to issue the same.

The defendant offered competent and uncontroverted evidence, tending to show that the said shares were duly attached by said corporation on the twenty-fourth day of May, 1878, upon a writ on that day sued out by it against the said George B. Stetson for a debt due from him to the corporation; that in said suit judgment was
27 subsequently rendered against said Stetson, and an execution issued; that said execution was duly levied on said shares on the thirteenth day of November, 1878, and a sale of them on said execution was duly made by the sheriff on the twenty-first day of November, 1878, at which sale they were purchased by the defendant. To meet this the plaintiff offered as testimony, tending to show that defendant had notice of the transfer of said shares prior to the attachment thereof, the answers of one Nahum Stetson, who was treasurer, clerk, and business agent of the defendant, to interrogatories propounded to him under the statute permitting the same. Among such interrogatories and answers relied upon were the following:

"Int. 23. Did he, in any conversation, inform you before November 14th, 1878, and when first, of his indebtedness to Herman Lissberger, the plaintiff; if so, what did he say about such indebtedness at any time before November 14th, 1878? State all you can remember, and say if you have so stated.

28 Ans. I cannot recollect that he ever mentioned Herman Lissberger.

Int. 24. When did you, in any way, know or suspect, or when

had you first heard of your son, George B. Stetson, owing said Herman Lissberger, and what had you heard; had you heard nothing of this sort before the date you name?

Ans. I heard, before the attachment, that there was a rumor in New York that he had pledged his stock to Herman Lissberger. This was some time before the attachment was made in the company's suit.

Int. 34. When first did you suspect that the stock of said George B. Stetson in said company was pledged to any one, or held by any one as collateral security, or that some one besides himself had a claim upon it; what led you to so suspect?

Ans. 34. When I heard of the person above mentioned it was a considerable time before the attachment in the suit of the Co.

Ans. to additional Int. I stated, in my answers to former interrogatories that I heard some time before the attachment that
29 there was a rumor that George B. Stetson had pledged his stock to Herman Lissberger, and that this was some time before the attachment made in the company's suit. I am not sure that I heard this before the attachment or before the execution issued. In my answer I intended to refer to the service of the execution, and not to the making of the attachment, and I mistook in saying that I heard to whom it was pledged. I do not know when I heard this, but I heard it from Isaac Pratt, Junior, and from no one else, and I never saw or heard any other notice of it. He said that he had heard a rumor in New York that George B. Stetson's stock was pledged, but he did not say to whom. He spoke of it in a conversation I had with him about various matters in Mr. Pratt's office in Boston, and I think that he asked me if I had heard of it, and I said no. This is all I remember of the conversation. It made little or no impression on me. No one else was present. I have stated everything that was said which I recollect. It
30 was recalled rather suddenly to my mind by Mr. Welch, when I answered before, and I answered without perhaps sufficiently reflecting upon it."

All the interrogatories to said Nahum Stetson for discovery and his answers are made part of this bill of exceptions, the same having been read in evidence by the plaintiff. The evidence introduced by the plaintiff tended to prove that an agent of the plaintiff, in the early spring of 1878, informed on elsaac Pratt, Jr., who was then a director of the defendant corporation, of said transfer to the plaintiff, giving as a reason that he wanted the company to know about it; that said agent inquired of said Pratt the value of said stock, and that he, Pratt, said he wouldn't sell his at its par value of one thousand dollars, and that immediately before bringing said suit and making said attachment said Nahum Stetson went to New York city and obtained from his son a statement of the accounts of money of the company he had collected and used, and could not refund, aggregating some twenty-three thousand dollars.

31 The defendant contended that if said evidence was competent to prove a notice to said Nahum, or to put him on the

inquiry whether said shares had been transferred to the plaintiff, yet that no such notice was effectual to deprive the defendant of the right as creditor to attach said shares as the property of said G. B. Stetson, under the statutes of the State of Massachusetts. But his honor refused so to rule, and instructed the jury that if they, upon the evidence, believed that said Nahum being the treasurer, clerk, and business agent of the company knew or had notice that said George B. Stetson had conveyed said shares to the plaintiff prior to said attachment, the plaintiff was entitled to recover.

To the above stated instructions by his honor, the presiding judge, the defendant excepted, and the jury having found a verdict for the plaintiff, the defendant files this bill of exceptions thereto.

Exceptions allowed.

DAN'L CLARK,
U. S. Judge.

32 (Copy.)

"A."

NEW YORK, *August* 10, 1877.

Bought of Mr. H. Lissberger, for account of Mr. George B. Stetson, sixty thousand (60,000) pounds refined ingot copper in store New York city, 25,000 lbs. being "Central" and 35,000 lbs. "Hecla & Calumet" brands, at nineteen (19) cents per pound, for immediate delivery, payable by buyer's notes to his own order, averaging four months, interest added at seven per cent. per annum. The buyer is to give, as security for the payment of the notes, a certificate of twenty shares of the capital stock of the Bridgewater Iron Company of Bridgewater, Mass., the par value of which is one thousand dollars per share, on delivery to him of storage receipts for the copper, the said certificate to be returned to the buyer (Mr. Stetson) on payment of the notes.

(S'g'd) T. D. HAZARD, *Broker.*

[Endorsed across face:] Accepted. (S'g'd) George B. Stetson.

33 (Copy.)

"B."

Irrevocable Stock Power.

Know all men by these presents, that I, George B. Stetson, for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer unto H. Lissberger, of New York, twenty shares of the capital stock of the Bridgewater Iron Co., standing in my name on the books of the said Co., represented by certificate by certificate No. 9, and do hereby constitute and appoint said H. Lessberger, my true and lawful attorney, irrevocable for me, and in my name and stead, but to * * * use, to sell, assign, transfer, and set over all, or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with

like full power, hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal, the tenth day of August, 1877.

(S'g'd) GEORGE B. STETSON. [SEAL.]

Sealed and delivered in presence of—
Witness:
T. D. HAZARD.

34 (Copy.)

"C."

Bridgewater Iron Company.

Certificate No. 9. Bridgwater, Mass. 20 shares.

Be it known, That George B. Stetson, of Bridgewater, is the proprietor of twenty shares in the corporate property of the Bridgewater Iron Company, numbered from 271 to 290, inclusive, subject to the provisions of the by-laws of the corporation, said shares being transferable by an instrument in writing, recorded by the clerk in the books of the corporation, and the surrender of this certificate to the treasurer.

Shares, $1,000 each.

In witness whereof, the seal of the corporation is hereto affixed, this 4th day of August, A. D. 1874.

[SEAL.] NAHUM STETSON, *Treasurer.*
GEORGE B. STETSON, *President.*

34½ For value received, I, ——, of ——, do hereby sell, assign, transfer, and set over unto ——, of ——, —— of the shares in the corporate property of the Bridgewater Iron Company, mentioned in within certificate No. — of said corporation, the assigned shares being numbered ——.

Dated at ——, this —— day of ——, A. D. eighteen hundred and ——.

Recorded in book 1, page —, of records of transfer of shares, at — o'clock and minutes — m., this — day of ——; A D. eighteen hundred and ——.

Attest:

——, ——,
Clerk of the Bridgwater Iron Co.

35 *Interrogatories to Nahum Stetson for Discovery, and his Answers thereto, made part of the Bill of Exceptions.*

Int. 1. Who is the clerk and who is the treasurer of the said defendant, The Bridgwater Iron Company? If you are the clerk and treasurer of said company, were you such clerk and treasurer during and through the years 1877 & 1878?

Ans. I am the clerk & treasurer of said company, and was so during the years 1877 & 1878.

Int. 2. Annex to your answers transcripts of the records of said company, showing your election as clerk and treasurer of said company for the years 1877, 1878, and 1879.

Ans. "Annual meeting of June 28th, 1877. The meeting was called to order, & the following officers chosen: Nahum Stetson, clerk; George B. Stetson, Isaac Pratt, Jr., Warren G. Corney, O. A. Washburn, Jr., Enoch Robinson, directors; Nahum Stetson, treasurer; Nahum Stetson, agent." "Annual meeting of June 24, 1878. The meeting was called to order by the president, & the following officers chosen: Nahum Stetson, clerk; George B. Stetson, Isaac Pratt, Jr., Warren G. Corney, O. A. Washburn, Jr., Enoch Robinson, directors; Nahum Stetson, treasurer; Nahum Stetson, agent." "Annual meeting of June 23, 1879. Our president having re-
36 signed on the 22d Nov., 1878, the meeting was called to order by the clerk, & the following officers chosen: Isaac Pratt, Jr., president *pro tem.*; Nahum Stetson, clerk; Isaac Pratt, Jr.; Nahum Stetson, clerk; Isaac Pratt, Jr., Warren J. Corney, O. A. Washburn, Jr., Enoch Robinson, Alfred M. Adams, directors; Nahum Stetson, treasurer; Nahum Stetson, agent."

Int. 3. Did you act at any time during the years 1877 or 1878 for said company in any other capacity than treasurer and clerk; if so, what, when, and during what period?

Ans. I acted as agent during these years.

Int. 4. Were you, during said years, the agent for said company otherwise than as treasurer and clerk of said company; if so, what was such agency, how long did it last, and during what period? Who appointed you? If you were appointed, or your appointment was authorized by vote, annex a copy of the vote of said company or its directors by which you were so appointed.

Ans. I acted as agent, as stated, & was appointed by the votes, copies of which have been given. As agent, I did the business of the company.

Int. 5. Annex a copy of the by-laws of said company as they were in the years 1877 and 1878.

Ans. I will annex a copy.

Int. 6. Who was the president, and who were the directors of said company in the years 1877 and 1878? Annex transcripts
37 from the records of said company, or of its directors, showing who were elected president and directors of said company for the years 1877 and 1878.

Ans. The president was George B. Stetson; the directors have been already stated & the votes electing them.

Int. 7. State whether or not said company accepted the twenty-sixth chapter of the acts of the year 1874 of the Legislature of the Commonwealth of Massachusetts; if so, annex a transcript from the records of said company, showing such acceptance.

Ans. It did. "Voted by a majority in interest of all the stockholders of said corporation to accept said act of 1874, entitled An act to establish the name & fix the capital of the Bridgewater Iron

Manufacturing Company, approved Feb. 25, 1874, being chapter 26th of the acts of the year 1874."

Int. 8. Did the president, clerk, treasurer, and a majority of the directors of said company sign and swear to the truth of a certificate of the character required by said act and record, the same in the registry of deeds for the county of Plymouth?

Ans. They did.

Int. 9. State whether or not, in the years 1877 or 1878, and when, by usage or by vote, any branches or departments of the
38 business of said company, whether of buying or selling or otherwise, were assigned or fell respectively to the different directors of said company; if so, how were the different branches of the business distributed among the different directors? If those branches of business were assigned by vote or votes of the company, or the directors, annex transcripts of such votes. If by usage or habit, state what the usage was.

Ans. The directors had no business assigned to them; transacted none of the business, except so far as they were controlled or employed by me.

Int. 10. In the years 1877 and 1878, or either of them, had any director or directors any charge of the business of the company in buying coal for said company; if so, who? Had any such director or directors any charge of the business of buying iron for said company or getting orders for iron manufactures of the company; if so, who? Had any director or directors any charge of the business of said company in buying copper for said company, or selling brass, copper, or other manufactures of said company; if so, who? If any such director or directors had any charge of any branch of the business of said company, what branch was it, and did he so have it by authority of any vote of the directors, or by a usage of the directors, or how otherwise? If by authority of any vote or votes,
39 annex transcripts thereof from the records of said company.

Ans. No one had except myself; every purchase was made by my direction; no such votes exist.

Int. 11. State what respective portions of the business of said company the different directors by name had any charge of, or special responsibility for, during the years 1877 and 1878.

Ans. None of the directors had any such charge.

Int 12. State whether or not George B. Stetson bought in New York any copper for said company, and to what extent he bought copper for said company in said years 1877 and 1878.

Ans. He bought none except by my special direction; I made all the purchases.

Int. 13. Is George B. Stetson, formerly the president of the Bridgwater Iron Company, your son?

Ans. He is.

Int. 14. In what other capacity than that of president of said company, if any, did your said son act in the years 1877 and 1878; was he or not an agent for said company in New York city during said years; and, if so, for the transaction of what kinds of business for the company; was he appointed such agent for the years 1877 and

1878 by any vote or votes of said company or its directors? If
40 so, annex a transcript of the same from the records of the company or its directors.

Ans. He sold tubes and iron under my direction; he was employed by me, and not by the company, to do work for the company under my direction.

Int. 15. What sort of business did the said George B. Stetson in the years 1877 and 1878, and for four or five years before, usually do for said company in the city of New York? Annex copies of all written communications to him in said New York, made by you as treasurer, clerk, or agent of said company, or any officer or agent of said company, requesting or referring to things to be done by him for said company of which you or said company have copies, including press copies.

Ans. He sold tubes and iron and did anything which I specially directed him to do; he made purchases under my special direction; I saw him once a week or oftener, and very little correspondence passed between us; neither I nor the company have any originals or copies of correspondence.

Int. 16. What, if anything, did you do to cause the action of the Bridgewater Iron Company to be brought against your son,
41 George B. Stetson, returnable at the October term of the superior court for Plymouth county in the year 1878; did any other officer or officers of the company act or advise with you in instituting said suit; if so, who; or did you alone cause the suit to be brought?

Ans. I requested Mr. Kingman, a lawyer, to bring the suit and attach the property, and I did it under my general authority as treasurer; I do not now remember that I consulted any director at the time.

Int. 17. Of whom, when, and where, and whether by letter or personal application to said George B. Stetson, did you obtain the account or the items of the account or the information as to the amounts of cash received, and the names of the parties from whom received by said George B. Stetson in the account annexed to the declaration in said action, a copy whereof is hereto annexed, marked "A"? State fully and particularly. Annex copies of any letters to him from you, or any officer of said company calling for such information or items, and of his answers thereto.

Ans. I got the accounts from my son and from the parties who had received the goods; their accounts were kept at Bridgewater; when my son sold goods the bills went from Bridgewater, and
42 therefore our books showed the accounts; I wrote to many of the persons and found that they had paid their bills; I have no such letters as inquired for.

Int. 18. At the time said action was brought, how long had said George B. Stetson been in arrears to said company in his accounts?

Ans. Some of the amounts for which the company sued had been collected by him probably some one or two years.

Int. 19. What conversation did you have with your son, George B. Stetson, before said action was begun by said Bridgewater Iron Company, in regard to amounts he owed said company, and when

and where? State such conversation fully and particularly, and say if you have so done.

Ans. I think I mistrusted that he had collected monies and not paid them over. I asked him in the month of February, 1878, and he admitted it and promised to pay them over. After that, in March or April, he gave me a memorandum of the amounts he had received, and said that he expected money which would enable him to pay the company. I pressed him to pay it. This is the substance of the conversation. He also said at one of these times that he had lost the money in his business.

43 Int. 20. Annex all letters, of which the said company has press copies, sent to said George B. Stetson by yourself, or any other officer or agent of said company, in relation to his account with said company, and all letters of his to said company, or any officer or agent of said company, in relation to said accounts.

Ans. The company has none.

Int. 21. What merchandise, at the time said action was begun, had been sent to him, said George B. Stetson, or forwarded through him, or the price of which was payable to him, or received by him, that had not been accounted for, with, or paid over to said company? State particularly.

Ans. No merchandise had been sent to him. The company sent the goods which had been sold directly to the parties who had bought them, some through him and some not. The account annexed to the writ, of which the paper annexed to the interrogatories seems a correct copy, shows the amount of monies collected by him and not paid over. They were the balances due from him on account of merchandise sold to these parties. Most of the merchandise was brass and copper tubes. If the accounts against the parties named are desired, they will be shown.

44 Int. 22. In any conversations between you and said George B. Stetson before November 14th, 1878, about or connected with the matters of the account in said action sued upon, what other creditors besides the said Bridgewater Iron Company did he say he had, and to what amounts did he say he owed them, and when did he say this?

Ans. I do not recollect the names of any. I do not know that he named any.

Int. 23. Did he in any conversation inform you before November 14th, 1878, and when first of his indebtedness to Herman Lissberger, the plaintiff; if so, what did he say about such indebtedness at any time before November 14th, 1878? State all you can remember, and say if you have so stated.

Ans. I cannot recollect that he ever mentioned Herman Lissberger.

Int. 24. When did you in any way know or suspect, or when had you first heard of, your son, George B. Stetson, owing said Herman Lissberger, and what had you heard? Had you heard nothing of this sort before the date you name?

Ans. I heard before the attachment that there was a rumor in New York that he had pledged his stock to Herman Lissberger.

This was some time before the attachment made in the company's suit.

45 Int. 25. In any conversation you had with said George B. Stetson before Nov. 14th, 1878, did you request or intimate to him that he give any security to said company for his indebtedness to said company; if so, what was said or otherwise communicated to him upon the subject of his giving security?

Ans. I do not recollect making any such request. I expected that he would pay the company.

Int. 26. Did you in any conversation inquire of said George B. Stetson as to his ability to give security to said company for his said indebtedness to said company, or did he say anything to you about such ability? State what either of you said to the other on this subject, and when it was said and where.

Ans. I did not, because I expected that he would pay what he owed.

Int. 27. State what said George B. Stetson ever said to you before May 28th, 1878, and before November 14th, 1878, and when as to his financial ability, then at the time of such conversation, to make good to the Bridgewater Iron Company the deficiency in his account with said company out of his own property or by the sale of the same, or by raising money on the same.

Ans. He told me when I pressed him for payment, as already stated, that he had money due him, & he should receive it & would pay what he owed the Co.

46 Int. 28. What, if anything, did your son, said George B. Stetson, say to you before May 28th, 1878, and Nov. 14th, 1878, and when he had done with the moneys or any of the same charged in the account on which said action was brought against him? Did he or not say he had spent it on his own private account? If not, what did he say? State particularly and fully what he said.

Ans. He said before the dates mentioned—but I cannot state the precise time; it was when I pressed him for payment—that he had lost the money in his own business.

Int. 29. What property, real or personal or mixed, and of what estimated value, had you known or believed your said son, George B. Stetson, was the owner of before he failed to pay over the money charged to him in the account in which said action against him was brought? Name all the property you then supposed him to own, and your then estimate of its value.

Ans. I supposed him to own 20 sh'r's in the Bridgewater Iron Co., & 11 sh's in the Parker Mills, & 5 sh's in the Weymouth Iron Co., but I did not know what else he owned.

Int. 30. Whenever your said son informed you of his inability to make good his account with said Bridgewater Iron Company,

47 if he so did, did you or not in some form or other inquire of him the reason why he did not sell his property to raise the money to pay his debt to said company; if so, what did he say and when?

Ans. I did not so ask him.

Ins. 31. What did your son ever say to you as to the reason why

he did not then make good in whole or in part his debt to said company, and when first did he say this?

Ans. He said money was owing to him, which he expected to receive, & he would then pay.

Int. 32. Did you, in connection with any conversation with him about his deficiency in his accounts with said company, ask him to sell his stock in said company, or why he did not dispose of it, or anything to this effect; if so, when and what did he say? State all the conversation with you on this subject.

Ans. I did not.

Int. 33. Did you or not before said action was brought ever request your son, or intimate to him, to transfer his stock in the Bridgewater Iron Company as security for his debt to said company, or sell said stock to pay the proceeds to said company, or say or communicate to him anything to such effect; if so, what and when, and what did he say?

Ans. I did not.

48 Int. 34. When first did you suspect that the stock of said George B. Stetson in said company was pledged to any one or held by any one as collateral security, or that some one besides himself had a claim upon it? What led you so to suspect?

Ans. When I heard of the person above mentioned. It was a considerable time before the attachment in the suit of the Co.

Int. 35. After you learned of the failure or inability of said George B. Stetson to make good his accounts with said company, to whom did you communicate the fact, down to Nov. 14th, 1878; was it so communicated confidentially or with instructions not to make the fact public?

Ans. I did not communicate it confidentially to any one.

Int. 36. When in 1878 did said George B. Stetson resign his offices as president and director of said company? Was such resignation made by writing and accepted by vote; if so, annex such writing to your answers and annex a transcript of such vote.

Ans. He resigned Nov. 22d, 1878, in writing. It was as follows: "New York, Nov. 22, 1878. Nahum Stetson, Esq., ag't & treasurer, Bridgeport Iron Co. Dear Sir: I beg to tender you my resignation as president & director of your company. Resp'y, George B. Stetson."

49 There was no other vote accepting it than as above set forth in answer to former interrogatory.

Int. 37. What, if any, correspondence was there between you and him as to such resignation? Annex the letters relating thereto to your answer.

Ans. I wrote him that he should resign, but I have no copy of my letter. I have no letter from him in relation thereto, except the letter of which a copy is given in my answer to the preceding question.

Int. 38. What conversation did you have with your son as to his resigning said offices and as to when he should so resign? State the whole of such conversation and when it took place.

Ans. I do not remember having any conversation on the subject.

Int. 39. What sales or transfers of shares of stock in said company have been made between August, 1874, and May, 1878? Give the names and places of residence of the parties receiving or making such transfer.

Ans. I object to answering unless directed by the court, as it relates to the private business of gentlemen, & has no relation to the matter in issue.

Int. 40. At what prices have you known stock in the Bridgewater Iron Company to be sold for between said August, 1874, and May, 1878, and who made the purchases?

Ans. I have not known of any sales at public auction.
50 The prices paid at private sales & the names of purchasers, &c., I do not wish to answer unless directed by the court, & for the reason given in the answer to the preceding question.

Int. 41. What in your judgment was the fair market value of shares of stock in the Bridgewater Iron Company on May 28th, 1878, and on the 14th day of December in the same year?

Ans. Five hundred dollars.

Int. 42. Was such stock worth less in the middle of December, 1878, than on the previous May? If so, how much less?

Ans. It was worth no more & was tending to a less value.

Additional interrogatory. In your answer to the twenty-fourth of the interrogatories filed in the above-entitled action you say: "I heard before the attachment that there was a rumor in New York that he had pledged his stock to Herman Lissberger. This was some time before the attachment made in the company's suit." And in answer to the thirty-fourth of said interrogatories you say: "When I heard of the rumor above mentioned it was a considerable time before the attachment in the suit of the company."

Now, will you state the date or dates, as nearly as you can, prior to said attachment or to November 14th, 1878, when you received any notice of such a rumor, or any information from any one
51 concerning the pledge by said George B. Stetson of his stock in the said company to Herman Lissberger, the plaintiff; state what person or persons, at such date or dates, gave you such information or notice, or how otherwise you obtained the same, and if by any newspaper, what newspaper and of what date; and state all that was said or otherwise communicated by and between you and such person or persons at the time or times when any such information or notice was given to you, and in giving the same, and who were all the persons present at the time, and on what occasion was it so given. State fully and particularly to the best of your recollection.

Ans. to additional int. I stated in my answers to former interrogatories that I heard some time before the attachment that there was a rumor that George B. Stetson had pledged his stock to Herman Lissberger, and that this was some time before the attachment made in the company's suit. I am not sure I heard this before the attachment or before the execution issued. In my answer I intended to refer to the service of the execution and not to the making of the attachment, and I mistook in saying that I heard to whom it was

pledged. I do not know when I heard this, but I heard it from Isaac Pratt, Junior, and from no one else, and I never saw or heard any other notice of it. He said that he had heard a rumor
52 in New York that George B. Stetson's stock was pledged, but he did not say to whom. He spoke of it in a conversation I had with him about various matters in Mr. Pratt's office, in Boston, and I think that he asked me if I had heard of it, and I said no. This is all I remember of the conversation. It made little or no impression on me. No one else was present. I have stated everything that was said which I recollect. It was recalled rather suddenly to my mind by Mr. Welch when I answered before, and I answered without, perhaps, sufficiently reflecting upon it.

NAHUM STETSON.

"A."—*Account Annexed.*

1878. George B. Stetson to Bridgewater Iron Co., Dr.

Apr.	1.	To cash received from Wallace & Sons, N. York	6,128 41
"	"	" " " Rogers' Locomotive Works, Paterson, N. J	2,176 69
"	"	To cash received from Barney, Parry, Williams' Co., Phil'a	1,299 77
"	"	To cash received from Parry, James & Co., Wilmington, Del.	806 76
"	"	To cash received from F. C. Knowles, New York	4,834 88
"	"	" " " W. C. Durychinck, New York	3,785 03
"	"	To cash received from Thos. J. Barnes, New York	1,537 00
"	"	" " " Mapie & Levy, Phil'a	1,745 06
"	"	" " " Thomas Gamon, Jersey City	350 45
"	"	To cash received from Lyles & Gilson, New York.	539 62
			23,203 73

53 *Copy of By-Laws of Bridgewater Iron Co.*

1.

Annual Meeting.

An annual meeting of the stockholders shall be held on the fourth Monday of June in each year, in the city of Boston, or in the town of Bridgewater. If, for any cause, said annual meeting should not be duly called or held on said fourth Monday of June, then it may be called & held at any time afterwards in said June & July following.

The choice of officers, agents, factors, & servants, alteration, amendment, or repeal of by-laws, the adoption of new ones, and any matter of business may be attended to at this meeting without mention thereof in the notice of the meeting.

2.

Officers.

There shall be chosen by ballot, at each annual meeting, five directors, a clerk, and a treasurer, who shall continue in office until the next annual meeting, and until others are chosen and qualified in their places.

3.

Directors.

A meeting of the directors shall be held after the adjournment of the meeting of the stockholders at which they have been elected, and the directors shall thereupon choose one of their number to be president.

If a majority of the directors are present at such meeting,
54 they shall exercise all the powers of the full board. If a majority are not present, the clerk shall notify the directors to assemble at some subsequent time, and at the meeting so notified, and at all subsequent meetings of the directors, a majority may exercise all the powers of the full board, provided all the directors have had notice of meeting by mail or otherwise. The directors shall have the care and management of the property & business of the corporation & of its financial concerns, and shall make annual reports to the stockholders, shall declare dividends, and shall have power to appoint or remove at pleasure all agents, factors, & servants necessary for conducting the business of the corporation, and to determine the compensation & duties (except as prescribed in these by-laws) of all officers, agent, factors, & servants of the corporation, and shall have all the powers and perform all the duties incident to their offices.

In case of a vacancy in the office of president, clerk, treasurer, or director, by death, resignation, or otherwise, the directors may appoint some person to fill such vacancy until the next meeting of the stockholders.

4.

Meetings.

All meetings of the stockholders shall be called by a notice signed
by the president or clerk or one of the directors, a copy
55 whereof shall be forwarded by mail, or delivered to each stockholder, or published in some newspaper published in the city of Boston seven days at least before the day appointed for the meeting.

Special meetings of the stockholders shall be held whenever the directors shall vote to call the same, and whenever three or more stockholders, owning in the aggregate at least one-fifth of the capital stock, shall in writing request the president or clerk to call such meeting. The object of every special meeting shall be stated in the notice calling the same. Should the president, clerk, & directors

refuse to call a meeting when so requested, it may be called by a notice signed by one of the stockholders so requesting it.

5.

Quorum.

At all meetings of stockholders eight or more stockholders owning at least one-fourth of the capital stock, present or represented, shall constitute a quorum, and when a quorum shall not be present the meeting may be adjourned to such time and place as a majority of those present shall determine.

6.

President.

The president shall preside at all meetings of the stockholders or directors. In case of his absence a president *pro tempore* shall be chosen to preside.

56 7.

Clerk.

The clerk shall be sworn to the faithful discharge of his duties. He shall keep a record of all transfers of stock. He shall record the proceedings of the stockholders and directors at their meetings. In case of his absence from any meeting a clerk *pro tempore* shall be elected, who shall be duly sworn, and shall make the record of such meeting.

8.

Treasurer.

The treasurer shall give bonds, if required, by vote of the directors. He shall have, subject to the order of the directors, the custody of all moneys, deeds, contracts, choses in action, documents, and the seal of the corporation. He shall keep a stock ledger & proper books of account. He shall affix the seal & sign the corporation name to all deeds of the corporation, unless some other person be authorized so to do.

9.

Seal.

The corporation shall have a seal bearing the name of the corporation, and the year of its incorporation.

10.

Certificates of Stock.

The certificate of stock shall be numbered consecutively, according to the date of their issue, shall be signed by the president and

treasurer, and bear the corporate seal, & contain the name &
57 residence of the stockholder and the whole number and the specific numbers of the shares for which the certificate is issued.

11.

Amendment of By-Laws.

These by laws may be altered, amended, or repealed, & new ones adopted at any annual meeting without previous notice, or at any special meeting if the notice calling such special meeting shall specify in substance the change proposed.

A true record.

Attest: JOHN G STETSON, *Clerk.*

58 UNITED STATES OF AMERICA, *Massachusetts District, ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Herman Lissberger *v.* The Bridgewater Iron Company, in said circuit court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-second day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[SEAL.] JOHN G. STETSON, *Clerk.*

59 *Bond on Writ of Error.*

Know all men by these presents, that we, The Bridgewater Iron Company, a corporation by and under the laws of the Commonwealth of Massachusetts, as principals, and Isaac Pratt, Jr., of Boston, and Nahum Stetson, of Bridgewater, both in said Commonwealth, as sureties, are held and firmly bound unto Herman Lissberger, of the city, county, and State of New York, in the full and just sum of twenty thousand dollars, to be paid to the said Herman Lissberger, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the thirty-first day of January, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Herman Lissberger, plaintiff, and said Bridgewater Iron Company, defendants, judgment was rendered against the said defendants, and the said defendants having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear

at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendants shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BRIDGEWATER IRON COMPANY,
By NAHUM STETSON, *Treasurer.* [L. S.]
ISAAC PRATT, Jr. [L. S.]
NAHUM STETSON. [L. S.]

Signed, sealed, and delivered in presence of—
DAVID G. PRATT.

Approved:

JOHN LOWELL,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:
[SEAL.]

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 349. The Bridgewater Iron Company, plaintiff in error, *vs.* Herman Lissberger. Filed 9th October, 1882.

116-8

Office Supreme Court U. S.
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JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

BRIDGEWATER IRON CO., PLAINTIFF IN ERROR,

v.

HERMAN LISSBERGER.

PLAINTIFF'S BRIEF.

BRIEF OF SOHIER & WELCH,

Counsel for Plaintiff in Error.

BOSTON:
TOLMAN & WHITE, LAW PRINTERS, 383 WASHINGTON ST.
1885.

Supreme Court of the United States.

BRIDGEWATER IRON CO., *Plaintiff in Error*,

v.

HERMAN LISSBERGER.

PLAINTIFF'S BRIEF.

The question to be decided in this case arises between the plaintiff below, Lissberger, who claimed to hold certain shares of the Bridgewater Iron Co., of Massachusetts, by virtue of an assignment, as collateral security, of the same, dated August 10th, 1877, from George B. Stetson, the President, to him, and the Bridgewater Iron Co., who acquired these shares by attachment, May 24, 1878, and subsequent execution and sale, on the 21st day of November, 1878.

The judge instructed the jury, "that if they, upon the evidence, believed that said Nahum being the treasurer, clerk, and business agent of the company, *knew, or had notice*, that said George B. Stetson had conveyed said shares to the plaintiff prior to said attachment, the plaintiff was entitled to recover."

The corporation contended "that if said evidence was competent to prove a notice to said Nahum, or put him on the inquiry whether said shares had been transferred to the plaintiff, yet that no such notice was effectual to deprive the defendant of the right, as creditor, to attach said shares as the

property of said G. B. Stetson, under the statutes of the State of Massachusetts."

The jury having found for the plaintiff, the defendant excepted to the instructions (printed Record, p. 11).

It appears by the Report that "the plaintiff offered no evidence (except as hereinafter stated) that he gave notice of said transfer to the clerk or treasurer of the corporation, or that he gave the transfer to the clerk to be recorded, or produced the same, or the said certificate to the treasurer, or applied for a new certificate of said stock to be issued to himself until the said fifteenth day of December, 1878," that is, about seven months after the attachment and after the sale in execution (Record p. 9).

The treasurer, after stating that he cannot remember that Nahum ever mentioned Herman Lissberger, says, that he "heard before the attachment, that there was a rumor that he (George B. Stetson), had pledged his stock to Herman." And he subsequently stated, "I am not sure that I heard this before the attachment, or before the execution issued. In my answer, I intended to refer to the service of the execution, and not to the making of the attachment, and I mistook in saying to whom it was pledged. I do not know when I heard this, but I heard it from Isaac Pratt, junior, and from no one else, and I never saw or heard any other notice of it. He [Pratt], said that he had heard a rumor in New York that George B. Stetson's stock was pledged, but he did not say to whom. He spoke of it in a conversation about various matters in Pratt's office, in Boston, and I think that he asked me if I had heard of it, and I said no. This is all I remember of the conversation. It made little or no impression on me" (Record pp. 16, 18, 20).

There was also evidence tending to prove that an agent of the plaintiff, in the spring of 1878, informed Pratt, who was then a director of the defendant company, of the transfer to the plaintiff, giving as a reason that he wanted the company to know about it, and inquired the value of the stock, and that Pratt gave an opinion about it.

This is all the evidence.

We contend:

1st. That an attachment of shares of a Massachusetts corporation, in May, 1878, perfected by execution and sale, passed the shares to the attaching creditor as against a previous conveyance, not recorded or made known to the recording officer of the corporation.

These were shares in a manufacturing corporation, and their transfer was governed at the time of the transactions in question, by the Acts of Massachusetts of 1870, ch. 224, § 26. These acts followed in this respect substantially the language, and expressed the meaning of former statutes. The words of the statute are, "shares may be transferred by the proprietor, by an instrument in writing under his hand, which shall be recorded by the clerk of the corporation in a book to be kept for that purpose. The purchaser named in such instrument so recorded, shall, on producing the same to the treasurer, and delivering to him the former certificate, be entitled to a new certificate."

The construction given to this statute by the highest court of the State of Massachusetts, will be adopted by this court, especially as the line of decisions upon this and the similar

statutes, which it follows, has been uniform and long continued.

Burgess v. *Seligman*, 1071 U. S. R., 20, 33–34.
Nesmith v. *Sheldon*, 7 Howard, 817.
Roman v. *Runnels*, 5 Howard, 134, 139.
Supervisors v. *U. S.*, 13 Wallace, 71, 81–82.
Fairfield v. *Gallatin*, 10 Otto, 47.

For the construction in Massachusetts, see the following cases:

In *Fisher* v. *Essex Bank*, 5 Gray, 373, which was a case of shares in a bank whose charter provided that they should be transferable only at its banking-house and on its books, it was held that they could not be effectually transferred as against a creditor of the vendor, who attached them without notice of any transfer, by a delivery of the certificates thereof, together with an assignment, and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment. SHAW, C. J., after stating what notice was given to the bank added: "But for reasons hereinafter stated, had there been a more formal notice of the transfer of the shares to the writers, and this given to a proper officer of the bank, it would have been unavailing." It was given to the president. And the Chief Justice further says: "In no way can these objects (the mode of alienating and the ascertainment of the title to the shares), be so well effected as by a transfer at the bank. The law might have provided that the bearer of the certificate should be deemed the holder, so that it might pass from hand to hand by mere manual delivery. But this would be attended with almost inextricable difficulty. It would be impossible for officers and co-proprietors to know who their associates

were," &c. "The shares could never be attached," &c. And, after stating the importance that the property held in shares should be attachable, he states that "All these objects are most effectually accomplished by making the transfer at the bank, the decisive act of passing the property, the legal, transferable, attachable interest."

Boyd v. *Rockport Steam Cotton Mills*, 7 Gray, 406. The delivery of a certificate of stock in a manufacturing corporation, indorsed with a printed transfer signed in blank, with the intention of transferring the stock as security for a debt due from the holder to the person to whom it is delivered, passes no title as against attaching creditors. In this case, the certificates of ownership stated on their face that the shares "are transferable by making an assignment on the back hereof, and on surrender of this certificate, a new one will be issued."

Blanchard v. *Dedham Gaslight Co.*, 12 Gray, 213. A sale in good faith of shares in the stock of a manufacturing corporation, accompanied by an assignment and delivery of the certificate, without notice to the corporation, is invalid as against a subsequent attachment and sale on execution. The Court refer to the Statute of Massachusetts, which as they say, provides that "any shares in manufacturing corporations may be transferred by the proprietor thereof, by an instrument in writing under his hand, recorded by the clerk of the corporation, in a book to be kept for that purpose; and the purchaser named in such instrument, so recorded, shall, on producing the same to the treasurer and delivering to him the former certificate, be entitled to a new certificate. This is the very language of the Statute of 1870 which governs this case, and the Court continue: "But the facts agreed in this case show that the

plaintiff and those under whom he claims, never gave the corporation any notice of the transfer to them, nor made any request to have it, nor asked for a new certificate until after the shares had been taken and sold on execution as the property of Odiorne, in whose name they stood in the books of the corporation. At the time of the seizure and sale the assignment and transfer had not been completed so as to be effectual against the creditors of the assignor."

In *Johnson* v. *Somerville Dyeing and Bleaching Company*, 15 Gray, 219, a delivery of the certificate indorsed with a printed transfer, signed but not filled up, was held to pass no title to the shares.

Patrick Rock v. *Nichols*, 3 Allen, 342, was a case where (I quote the Judge's opinion) "Shares in the stock of the Eastern Railroad Company were conveyed to the plaintiff in due form by John Rock, but the conveyance thereof was not recorded in the books of that corporation. After that conveyance was made, the same shares were sold as the property of John Rock on an execution obtained against him by one of his creditors." The statutes at that time applicable to railroads, provided that shares in railroad stock may be transferred by any conveyance in writing, recorded in certain books, and declare that no conveyance should be valid against any other persons than the grantors or their representatives, unless so recorded. The conveyance, therefore, was held not valid, but the shares were left open to attachment.

This Statute is, no doubt, more express than the Statute under which the present case comes, but the Massachusetts

Cour thave construed the latter statute in a similar maner, and they refer to this case of *Rock* v. *Nichols*, in the case next cited.

Central National Bank v. *Williston*, 138 Mass., 244—decided in September, 1884. In this case "an owner or stock and holder of a certificate thereof, in his own name, in a manufacturing corporation existing under the general laws of, and doing business in this State, delivered the certificate, with a printed assignment in blank, signed by him, indorsed upon it, to the plaintiff bank, for the purpose of transferring the stock to it, to hold as security for negotiable paper. While it so held the certificate, and before the assignment had been filled out, and before notice of the assignment had been given to the corporation, the stock was attached as the property of the assignor, by the defendant Williston, who had no knowledge or notice of the assignment although he had *good reason to suspect the owner* of the stock had raised money upon it." There were two assignments, but one of them was made when the Statute of 1870, the same statute under which the present case comes, was in force. The Court, after referring to the different views taken in different States of similar statutes, add: "But the question here is upon the construction of a statute of this State, which is settled by the intention shown by the course and policy of legislation upon the subject, and by the decisions upon this and similar statutes." The Court then review the statutes, and after referring to the case of *Boston Music Hall* v. *Cary*, 129 Mass., 435, which was the case of a corporation, not a manufacturing corporation, and not subject to the statute affecting manufacturing corporations, added, in relation to a statute lately passed, that, "the

Statute of 1884, ch. 229, which made a delivery of a certificate of a corporation with a written assignment or power of attorney to transfer, sufficient against all parties, was plainly not declarative of the meaning of former acts, but *the establishment of a new rule*, showing a change of legislative intention." And after referring to the cases cited in this brief, and amongst others to *Rock* v. *Nichols*, they add: "The question in the case at bar is not presented in precisely the same aspect as in any of the cases cited, but it is the same question. The stock has not been sold and transferred under the attachment, but the right to it was fixed when the attachment was made." . . . .

"There is no occasion for us to consider whether the evidence of notice of the assignment to the attaching creditor or of an offer of the old certificate by the assignee to the corporation, with a request for record and for a new certificate, would have been material."

The certificate contained on its face the words, "Transferrable only on the books of the company, in person or by attorney, on surrender of this certificate," but no reference seems to be made to this in the opinion.

The court in Massachusetts has followed the doctrine laid down in the English courts that it had become an axiom that in Public Statutes, words only directory, promissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit.

Queen v. *Tithe Commissioners*, 14 Q. B., 459.
Chapman v. *Mulvain*, 3 Exch. 61.

The first of the cases cited, *Fisher* v. *Essex Bank*, 5 Gray, is a case where the charter provided that shares should only

be transferrable at the bank and on its books; but though the Statute of 1870, and the similar statutes which it followed, are less positive than the charter of this bank, the Massachusetts courts have construed them in the same way, and as establishing a similar rule.

In the case of *Blanchard* v. *Dedham Gas Light Co.*, 12 Gray, also cited above, in which the words of the statute are the same as the language of the present statute, there was an assignment filled up, and a delivery of the certificate, but there being no notice to the corporation, this assignment was held invalid against a subsequent judgment and sale on execution.

In the last case cited, *Central N. Bank* v. *Williston*, there was an attachment only before the proper notice was given; but an attachment in Massachusetts, if perfected by a subsequent execution and sale, is effectual against a conveyance not properly notified to the corporation.

And this brings us to the Second point. That there was no *such* notice received, or knowledge on the part of the treasurer, clerk, and business agent, that George B. Stetson had conveyed his stock, as prevented the attachment taking effect.

The jury were instructed to find for the plaintiff, if the treasurer, clerk and business agent *knew*, or had notice, that said George B. Stetson had conveyed said shares to the plaintiff prior to said attachment.

The only evidence offered (as appears by the Record, p. 9), is printed, and that evidence, taking it most strongly for

the plaintiff, in fact, more strongly than is justifiable, is, that an agent of the plaintiff before the attachment, informed a director of the corporation of the transfer, and that he wanted the company to know it, and that the director, Pratt, mentioned it to the person who was treasurer, clerk and business agent.

If the communication had been made directly to the treasurer and clerk, it would not have been sufficient. The assignment should have been *presented* to him and an offer made to surrender it, and a new certificate asked. Nor was the recording officer asked through any one to record the transfer, so that the transferree might be subject to any liabilities, and entitled to such rights as an assignment would have caused.

But the communication was not made to the recording officer, nor was Pratt, the director, requested to communicate it to him, although the agent said he wanted the company to know about it; nor did Pratt agree to communicate it to the recording officer, nor was any assignment of the shares shown.

Furthermore, the recording officer states that Pratt, in the course of a general conversation, stated it as a rumor. It clearly appears that this officer never knew or had notice of it from any other source.

We submit that no casual notice communicated by a third person, even though a member or director of the corporation, no knowledge thus acquired, if it can be called knowledge, can have the effect of dispensing with the requirements of the statute of 1870, ch. 124, as construed by the Massachusetts court, that shares can only be transferred by an instrument in writing under the proprietor's hand, to be

produced to the recording officer, and delivered, or offered to be delivered to him, with the old certificate. If the recording officer should refuse to give the new certificate when thus produced, and request made, the purchaser would either hold the stock, as against a subsequent attaching creditor, or the corporation would be liable for the value.

In *Blanchard* v. *Essex Bank*, where notice of the transfer had been given, it was held not sufficient, there having been no transfer on the books or presentation of the certificate to the recording officer; and, although in that case the charter required a transfer on the books, the general law of Massachusetts, as construed by its courts, requires the same acts.

And in *Central National Bank* v. *Williston*, 138 Mass., 244, decided this year, it appeared that "the attaching creditor had good reason to suspect that the owner of the stock had raised money upon it," though he had no knowledge or notice of the assignment (p. 245).

In *Newell* v. *Williston*, 138 Mass., 240, which arose under the Public Statutes, ch. 106, a statute similar to the one affecting this case, and under Public Statutes, ch. 105, § 24, which provided that "no sale, assignment or transfer shall affect the title or rights of an attaching creditor, until it is recorded upon the books of the corporation, or a new certificate is issued," the plaintiff had sent to the president of the defendant corporation a letter notifying him, and requesting the stock to be transferred on the books of the corporation, and this letter was pinned to the stub of one of the certificates of the stock which had been attached, and was shown to the attaching officer at the time of the attachment; and though the creditor had no actual knowledge or notice of the pledging of the stock, "he had good reason to suspect